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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term 1955

No. 500

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., ETC.,
Petitioner,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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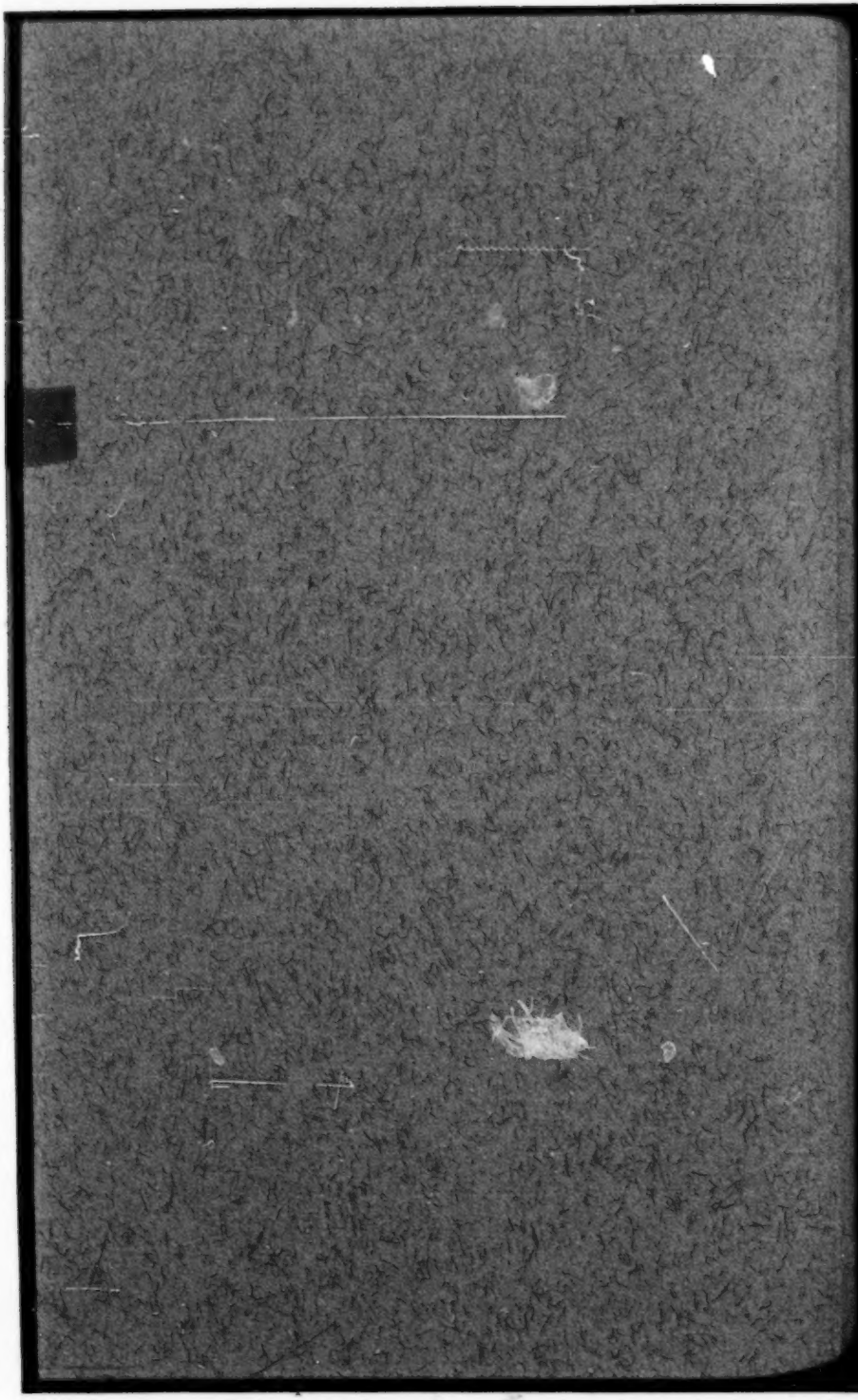

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Societe Internationale Pour Participations Industrielles et Commerciales, S.A.,[1] a Swiss holding corporation having its domicile at Basel, Switzerland—plaintiff in the District Court in an action for recovery

[1] For sake of brevity, petitioner is known as "I. G. Chemie" or "Interhandel".

of vested property under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9a)—prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 30, 1955, affirming a dismissal of petitioner's action with prejudice because of petitioner's non-compliance, through no fault of its own, with a discovery order of the District Court.

OPINIONS BELOW

The principal opinion of the District Court (J.A.[2] 605) is reported in 111 F. Supp. 435; and a supplemental memorandum of November 16, 1953, (J.A. 672) is unreported. The opinion of the Court of Appeals (R. 1919) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on June 30, 1955, (R. 1941). Order denying petition for rehearing was entered September 1, 1955 (R. 1959). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

In an action by a Swiss national for the recovery of property under the Trading with the Enemy Act,

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[2] J.A. refers to the printed Joint Appendix which is in four volumes. The pages of the Record certified to this Court carry the same page-numbers through Volume IV. Therefore, material in the Joint Appendix will be cited J.A. —. Additional documents following Volume IV continue the numbering sequence of the Joint Appendix, but will be cited as R. —, instead of J.A. —.

may the District Court validly enter at the pretrial stage an order of dismissal with prejudice, as a sanction for non-compliance with an order to produce in Switzerland documents belonging to and in the possession of an affiliated bank where (a) the issue of fact as to control over the desired documents was resolved upon irregularly conducted proceedings on the basis of *ex parte* data, hearsay and the like, without the hearing of witnesses or cross-examination; (b) actual production of the documents in Switzerland was prevented by a lawful order of the Swiss Government; and (c) the judicially determined fact of petitioner's good faith in failing to comply with the order to produce, conclusively negatives the presumption of bad faith constitutionally necessary to support such a dismissal under *Hammond Packing Co.* v. *Arkansas*? There is the further question whether the District Court should have considered the vast number of documents actually produced as constituting substantial compliance with its order, at least to the extent of conducting an inquiry as to the necessity, if any, for the production of the balance of the papers.

Broken down into the several parts, the questions are as follows:

(1) Whether the irregular proceedings and record before the District Court and the reasons given by that Court, support its determination that the documents called for by the discovery order were in the possession, custody or control of petitioner. In this connection, an inherent question is whether the standards for adequate findings and other proper safeguards in respect of a trial of a case upon the merits by a judge, should not equally apply to a *factual* hearing upon a discovery motion under Rule 34, Fed. R. Civ. P.,

especially where the facts are extremely complex and disputed, and the drastic sanction of dismissal with prejudice and without a trial on the merits is imposed upon a party.

(2) Whether, assuming *arguendo* that the discovery order was valid, a subsequent seizure of the documents by the Government of Switzerland to prevent their disclosure in violation of the secrecy precepts of that country, thus making compliance with the order impossible, would not excuse petitioner from the requirement to produce and *must* result in a dismissal of petitioner's action with prejudice.

This question involves the basic points (a) as to whether, in a case of involuntary and innocent inability to comply, a dismissal of petitioner's action with prejudice is supportable under Rule 37(b) (2) (iii) or Rule 41(b) of the Federal Rules of Civil Procedure;[3] and, (b) also as to whether such a dismissal violates the constitutional guarantee of due process within the doctrine of *Hammond Packing Company* v. *Arkansas,* 212 U.S. 322, in view of the fact that there was a finding by the Special Master—approved by the Court—of good faith of the petitioner regarding non-compliance.

(3) Whether, after petitioner, by certain measures, was able to tender for inspection over 63,000 of the called-for documents, the District Court abused its discretion in not inquiring if there was *good cause* for the production of any more. Respondents refused to look at such documents and the District Court did not deem it necessary for respondents to do so, taking

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[3] The District Court relied upon both rules, while the Court of Appeals relied only upon Rule 41(b).

the position that no examination was required until *full* discovery was tendered.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The pertinent constitutional and statutory provisions and rules of procedure are printed in Appendix A, *infra,* at pages 1a to 7a.

STATEMENT

On October 21, 1948, petitioner filed its complaint in the United States District Court for the District of Columbia against the Attorney General and the Treasurer of the United States pursuant to Section 9(a) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 9a), to recover property belonging to it which had been vested by the Alien Property Custodian under Section 5(b) of the Act. The property in question consisted of over 90% of the capital stock of General Aniline & Film Corporation (a Delaware corporation having its principal office in New York City), estimated to be of the value of $100,000,000, and cash of about $2,000,000 in New York banks. (J.A. 148). The issues in the action are (1) whether appellant was enemy-tainted (German) within the doctrine of *Clark* v. *Uebersee Finanz-Korporation,* 332 U.S. 480, and (2) the ownership of the vested property. (J.A. 358, 371). The pleadings are at issue, but various pretrial procedures and resulting hearings have delayed a trial on the merits.

In early 1949, cross-motions were filed by the parties for discovery of the other's relevant papers and documents. Both motions were granted and a schedule of discovery proceedings was prescribed by the

court. (J.A. 335). Respondents had sought also to require petitioner to produce the records of a Swiss private bank known as H. Sturzenegger & Cie. (formerly called Ed. Greutert & Cie.), upon the ground that such bank was an affiliate of petitioner. Petitioner opposed that portion of respondent's discovery motion upon the ground, amongst others, that it had neither possession, custody nor control of the bank's records, as required by Rule 34, Fed. R. Civ. P. The District Court made a tentative finding of *prima facie* control (see memo, op. Ch. J. Laws dated June 23, 1949, J.A. 338), and included in its order of July 5, 1949, the requirement that the petitioner produce the bank's records for inspection in Switzerland by the respondents' agents. (J.A. 339).

Pursuant to the discovery schedule, respondents' agents appeared in Switzerland ready to inspect records of petitioner and the Sturzenegger bank records on or about July 10, 1950. Prior to that time, on several occasions, petitioner had asked the District Court to relieve it of the requirement relating to the bank's papers, but to no avail other than that the Court said that it would deal with the situation as it might thereafter develop. (J.A. 74).

On June 21, 1950, the Swiss Government, acting through its Department of Justice and Police, and pursuant to what is known in Switzerland as its "preventive police power," seized the bank's records to prevent their wholesale disclosure to the officials of the American Government in violation of the Swiss secrecy laws. (J.A. 415, 469). Consequently, respondents were unable at that time to inspect the bank's records, but they did inspect the corporate records of

petitioner, taking over 70,000 microfilms of its books and papers.[4]

In the Fall of 1950, respondents moved to dismiss petitioner's complaint as sanction for its failure to produce the Sturzenegger bank's records, charging collusion between the Swiss Government and petitioner. (J.A. 417). The District Court referred to Special Master William J. Hughes, Jr., the questions as to (a) the charge of collusion, (b) the efforts of petitioner to overcome the seizure order and (c) the validity under Swiss law of the seizure. (J.A. 452-459). The reference and its resulting proceedings—frequently referred to by the parties as the "good faith proceedings"—consumed the time from February, 1951 to February, 1953, and ended in complete exoneration of petitioner. (J.A. 545). The District Court (Chief Judge Laws), in his opinion of February 19, 1953, (111 F. Supp. 440; J.A. 610-611), overruled respondents' exceptions to the Master's report, and ratified it in its entirety. (J.A. 633).

Nevertheless, and despite its finding that petitioner was unable to produce the Sturzenegger records, the District Court sustained respondents' motion to dismiss upon the ground that petitioner's non-compliance with the discovery order was in and of itself sufficient basis to impose the sanction of dismissal with prejudice. (111 F. Supp. 445; J.A. 623).

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[4] It should be kept in mind that *petitioner and H. Sturzenegger & Cie are two different companies*, and that the latter is not a party to these proceedings. Production of petitioner's records is not in issue in the present appeal. *Petitioner complied substantially with that portion of the disputed discovery order requiring it to produce its own records.*

In the course of petitioner's efforts to have the Swiss Government dissolve the seizure order, it had developed that the Swiss Government was willing to relieve the situation if and to the extent that the bank's customers, and every one else having a right to claim secrecy in respect of the bank's records, would execute waivers of their secrecy rights.[5] The District Court took cognizance of this provision in its decision of February 19, 1953, (111 F. Supp. 447; J.A. 626), and postponed dismissal for several successive periods of time to allow petitioner to pursue that course.

Faced with the threat of dismissal, petitioner undertook this task, and by October 19, 1953, had accomplished the release for inspection of over 63,000 Sturzenegger bank records. (J.A. 668). These records were brought to the United States and tendered to respondents for inspection, but respondents declined to look at them, (J.A. 666), and the District Judge approved of this attitude on their part, taking the position that unless petitioner tendered *every single record* of the bank, it would have failed to comply with his discovery order. (J.A. 672-673).

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[5] The Special Master's Conclusion No. 10 (J.A. 547) in the good faith proceedings comments upon the effect of these secrecy rights, as follows:

> "10: The necessity under Swiss law for the waiver by parties—multiple or otherwise—who own the secrets contained in the Sturzenegger papers demonstrates that a holding of *prima facie* control of such papers by the plaintiff, within the terms of Rule 34 F.R.C.P., does not fully resolve the problem. *If the intervention of a third party, an independent agent, is necessary to produce the papers, then by definition plaintiff has no control over their production.*" (Emphasis supplied)

This plainly shows that petitioner *never* had "control" over the bank's papers.

At the juncture when petitioner had tendered the above-described documents for inspection, and had asked to be relieved from the status of default declared by the District Court's opinion of February 19, 1953, and was asking the court to extend the time further for petitioner to complete the releasing process in Switzerland, (J.A. 663-666), the District Court ordered dismissal with prejudice. (J.A. 679).

The District Court, although requested to do so, (J.A. 674-675), refused to make findings of fact. (J.A. 678). On page 10 of the Court of Appeals' opinion, (R. 1928), the District Court's opinion of February 19, 1953 (111 F. Supp. 435) is treated as sufficient in this connection. At one point on that page the Court of Appeals states that the "conclusions of the District Court" "are set forth clearly and with sufficient fullness" in the District Court's opinion; and later, on the same page it is stated that "For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and, for purposes of our favorable review, find adequate support in the record."

Petitioner disputed the foregoing in the Court of Appeals both before and after the decision. Petitioner's analysis of the decision in this respect is set forth in its petition for rehearing in banc, copy of which is printed as Appendix B to this petition, *infra,* pages 8a to 20a. See, particularly, pp. 11a-13a.

While petitioner believes that there is not any substantial evidence in the record to support a conclusion that the Sturzenegger papers were in its possession, custody or control, as determined by the District Court, and, therefore, that such determination is *clearly erroneous,* this phase of the matter is being presented to this Honorable Court from the stand-

point that the proceedings in the District Court were improperly conducted, resulting in the establishment of *a most irregular record* which was brought to the Court of Appeals; *and that thereby there has been a substantial departure from the usual course of judicial proceedings which the Court of Appeals has improperly sanctioned.*

There was no hearing in the District Court at which witnesses testified. Hearings there were based upon arguments of counsel, both upon the law and upon inferences to be drawn from documents on file *and not on file* in the case. Documents were referred to by respondents (defendants-appellees below) in briefs and memoranda, and were neither offered in evidence nor shown to the District Judge.[6] Portions of deposi-

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[6] As an example of this most unusual situation, petitioner, in its Reply Brief below—page 15, called the attention of the Court of Appeals to an argument of respondents based upon an alleged "fact" that was not supported by a "Record" citation, and petitioner pointed out that there could be no such citation because it was not in the record before the lower court, explaining as follows: (footnote 22, page 15, Reply Brief):

> "Here is an excellent example of the presentation by appellees to the lower court in argument and briefs of 'facts' which were not in the record. We call this Court's attention to appellees' brief below, entitled 'Objections to Special Master's Report,' etc. filed September 9, 1952, (R. 2838), and particularly page 6 thereof at R. 2843. In the first full paragraph on that page, reference is made to the 'joint' telephone board. Cited in support thereof is 'D-4423, January, 1937.' Footnote 5 on that page stated that 'Citations of this nature refer to documents produced by plaintiff from its files for inspection and copying by defendants.' Such documents were not before the lower court. There are 29 of such citations on that page of appellees' brief below, none of which were actually before Judge Laws, except through the statements of appellees' counsel."

tions, referred to by respondents in their brief in the Court of Appeals, were never called to the attention of the District Judge. Exhibits to a 6,000-page deposition—not identified by the deponent in the course of the deposition—were not even shown to the District Judge, but are printed in the Joint Appendix—see Volume IV—at the insistence and expense of respondents.[7] The Court of Appeals had access to depositions of respondents' witnesses (Merton, J.A. 1826; Euler, J. A. 1865; and Schmitz, J.A. 1908), although they were not offered in evidence in the District Court and no judge has yet had occasion to rule upon petitioner's many objections appearing therein. Reports of the Swiss Compensation Office (J.A. 205-324)—containing statements and conclusions of investigators—which found their way into the files of the District Court by way of merely an identifying affidavit of one of counsel for respondents, (J. A. 198), were not proof of any alleged fact therein stated.

It was in view of the above-described situation that petitioner urged the District Judge to make findings of fact so that the evidentiary basis for his conclusions could be clearly delineated. In its petition for rehearing below, petitioner has demonstrated to the Court of Appeals that the District Court failed to state a single fact from which a conclusion of petitioner's control over Sturgenegger could be reason-

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[7] Some examples of such "exhibits"—which have not been *identified*—printed at the request of respondents, are found at J.A. 1705-1727. (See Record 11153, 11159, 11421, 11538 and 11545.) The witness, when shown or asked about such documents or their contents, answered that he did not know or recollect. See, e.g. 11161.

ably inferred. (See, *infra.* pp. 10a-11a, Appendix B).

The Court of Appeals affirmed the order of dismissal with prejudice with one modification.[8] After affirming—by very brief discussion—the primary decision of the District Court as to "control" under Rule 34, just referred to above, the Circuit Court ruled that, *despite the blameless status of petitioner itself,* dismissal with prejudice was not only provided for but required under Rule 41(b), Fed. R. Civ. P., and that the decision of this Court in *Hammond Packing Company* v. *Arkansas,* 212 U.S. 322, did not bar such a result.

The Court of Appeals was unwilling to follow the District Judge in basing the dismissal upon Rule 37 (b)(2)(iii) Fed. R. Civ., in view of the element of wilfulness that is inherent in that provision, since, of course, that element is entirely lacking in this case. Instead, both Courts embraced the idea that, aside from refusal or disobedience—which naturally contemplates wilfulness—the power is inherent in a court —reflected in Rule 41(b), Fed. R. Civ. P.—to default a party for mere failure to act regardless of his capacity to do so or his intention in that respect.

The appellate court then enunciated a doctrine—*never before considered,* petitioner believes, by the courts of the United States, except of course, by the

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[8] "One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this Court in this case, and not then if within such period discovery is made as ordered. This will afford another opportunity to bring the case on for a trial and decision on the merits." (R. 1940).

District Court in this case[9]—that dismissal of this case does not violate the Constitutional right to due process of law because it results entirely from the act of petitioner's Government. The Court stated, at page 13 of the slip opinion (R. 1931):

> "This [that Rule 37 does not exhaust the court's powers] is especially so where the action of a foreign sovereign, though a friendly one, has given rise to the problem, creating a situation hardly contemplated by the framers of Rule 37. Yet we cannot think they intended that a District Court would be powerless to solve the problem in a just manner, consistently with due process of law."

The decision of the Court of Appeals seems to constitute a blending of two ideas, namely, (1) that due process of law is not violated by requiring a plaintiff, regardless of its freedom from fault, to make full discovery as a condition to trial of its complaint—called "accepted procedures," and (2) especially, when "a plaintiff by action of its own government is disabled from complying with discovery rules applicable generally to litigants under the law of the forum."

Hammond Packing was disposed of at one point by the statement that it "seems inapplicable", (p. 13 slip op; R. 1931) and at another by the remark that "our view * * * does not lean heavily upon the theory of a factual presumption adverse to the one who fails

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[9] "* * * The question is when, upon the exercise of this sovereign power, it becomes impossible for a subject to comply with established procedures in this Court for securing evidence, shall this Court permit trial of the case? Or shall it rescind its order to produce? The question appears to be a *novel* one, not hitherto decided by a Court of the United States." (Emphasis supplied), (D.C. D.C. 111 F. Supp. 443; J.A. 619).

to produce the papers ordered." (p. 18, slip op; R. 1936). At still a third point, (p. 15, slip op; R. 1933) the Court remarked:

> "If the Swiss authorities had not then intervened, and if Chemie had willfully refused to comply with the order, dismissal of its complaint with prejudice, based on such refusal, would not have been an unconstitutional deprivation of property, *Hammond Packing Co.* v. *Arkansas, supra.* at 351."

The result is, petitioner submits, either that dismissal with prejudice and upon the merits is held to be proper without any fault on the part of a plaintiff, tested both by the Rules and by "due process", because "necessity for discovery as an aid in the development of facts" is an "accepted procedure", or it is held that a national of a friendly foreign government, standing before the courts of the United States, must assume, vicariously, full and absolute responsibility for what its sovereign may do upon its own soil in respect of its own laws.

Petitioner submits that the former runs headlong into the "due process" guarantee, as reflected in the *Hammond Packing* case; and that if the latter is the law,—which petitioner seriously doubts—this Honorable Court has not had the opportunity or occasion so to consider or to declare it.

Neither of the lower courts considered whether the 63,000 documents of the Sturzenegger Bank which were produced, satisfied respondents' needs. The Court of Appeals merely mentioned the fact that the documents were tendered to respondents and observed that it was not clear from the record what percentage of the papers ordered produced by the July, 1949 order was repre-

sented by the tendered documents.[10] Since both courts had their sights set upon full discovery only, any less quantity, no matter how substantial, did not appear to interest them. Good cause constituting such an important prerequisite to discovery under Rule 34, Fed. R. Civ. P., (see *Hickman* v. *Taylor,* 329 U.S. 495), and the number of tendered papers being so large, how can it be said on the part of respondents, without an inspection, that they cannot obtain what they are seeking from the available documents? Petitioner submits that the adoption of a reasonable alternative to summary dismissal, such as was done by the Second Circuit Court of Appeals in *Hyam* v. *American Export Lines, Inc.,* 213 F. 2d 221, in a comparable situation, avoids that which is tantamount to arbitrary action in dealing with such difficult problems.

REASONS FOR ALLOWANCE OF THE WRIT

Not since 1947, in *Hickman* v. *Taylor,* 329 U.S. 495, has this Honorable Court decided a case involving the discovery features of the Federal Rules of Civil Procedure. There, important questions were presented in a setting where the liberty of individuals was at stake. Here, property valued at $100,000,000 is involved. The property is claimed by petitioner, a Swiss corporation domiciled in Switzerland, and all its rights to the property are being cut off without a trial on the merits of petitioner's statutory action under Section 9a of the Trading with the Enemy Act (50 U.S.C. App. 9a).

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[10] At least the quantity is in excess of the figure of 55,550 (J.A. 235), which was in the District Judge's mind at the time of the order (J.A. 340).

As sanction for petitioner's non-compliance with a discovery order through no fault of its own, its action has been dismissed with prejudice, and the dismissal under Rule 41(b) Fed. R. Civ. P., operates as an adjudication upon the merits.[11]

This petition presents questions as to procedure in the District Court in the hearing and resolving of a complex and vigorously contested issue of "control" under Rule 34 Fed. R. Civ. P.; and whether a federal court—inherently, or under the Federal Rules of Civil Procedure, or under the due process clause—has the power and authority to dismiss with prejudice a cause of action when the plaintiff is without fault—either wilful or neglectful—in its non-compliance. An additional question in this case is whether, since there appeared to be a reasonable alternative which might have avoided such drastic action, the lower courts should have pursued that course, at least until it was demonstrated—if it could be—that such alternative did not provide adequate discovery to respondents under the circumstances.

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[11] Rule 41(b) provides, in part, as follows: "For failure of the plaintiff * * * to comply with * * * any order of court, a defendant may move for dismissal of an action * * *. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, * * * operates as an adjudication upon the merits."

See, also, the concurring opinion of Circuit Judge Fahy—the writer of the opinion in the case at bar, in *Holcomb* v. *Holcomb*, 93 U.S. App. D.C. 242, 209 F. 2d 794, in which he stated:

> "Rule 41(b) requires us to consider the dismissal of the first suit as an adjudication upon the merits."

Entire Rule 41(b) is reproduced in Appendix A, *infra*, p. 6a.

The District Court's conduct of the proceeding was so irregular, and its decision so unsupported, as to call for an exercise of this Court's power of supervision.

The discovery motion in this case is the rare exception to the "run" of such motions. The instant facts are more numerous and much more complex than those of most trials upon the merits of a case, and, in addition, they are seriously in dispute.

In such a situation, summary procedure by a District Judge, which was employed in this case and which is usually adequate to reach the correct determination regarding a discovery motion, has produced a proceeding in which the normal rules for the treatment and handling of evidence have been wholly ignored with the end result of evolving a record which abounds with hearsay, innuendo, *ex parte* statements, remarks of counsel and a great amount of outside-of-the-record-material. This was grievously so, as outlined on pages 10-11, *ante,* in which has been set forth a description of the manner in which the District Judge proceeded to hear the motion. The judge and respondents seemed to assume that anything which was in the file of the case—and, indeed, matters *not* in the file—could be resorted to without proof, formal or otherwise, of the alleged fact sought to be established.

There were no offers of proof, to which objections could be made. No witnesses were put upon the stand. Counsel, in briefs and in oral argument, adverted to papers in the Court's file without regard to whether the alleged fact involved was or was not established or admitted.

And the record which went to the Court of Appeals comprised a combination of all this heterogeneous material, much of which was relied upon by respondents to support the District Court's decision. One example

will illustrate the point. Respondents took the pretrial deposition of Dr. Hans Sturzenegger, one of petitioner's directors. It encompassed over 6,000 pages and consumed many months' time. Much of that deposition is reproduced in the Joint Appendix, beginning with page 755 in Volume II and filling all of Volume III. Petitioner does not dispute the proposition that admissions of this witness in his deposition may be invoked against it. However, the really serious difficulty arises with respect to numerous German documents which were marked by respondents for identification in the course of the deposition, and then shown to the witness who answered that he could not identify the document, nor recollect anything about any event referred to therein. Necessarily, such documents were annexed to the deposition, but in no sense do they constitute evidence. Yet, respondents caused many to be printed in the Joint Appendix, Volume IV, examples of which are given in footnote 7 on page 11, *ante*. Petitioner has no way of knowing what influence such documents may have had upon the Court of Appeals in concluding that the District Judge's "findings" "find adequate support in the record." That such documents may have had some effect upon the appellate court is illustrated by the following sentence appearing on page 10 of its slip opinion (R. 1928):

> "* * * we point out that the narration in Chief Judge Laws' opinion of the relation of Hans Sturzenegger to I.G. Chemie, his dominant position with respect to H. Sturzenegger & Cie., which is the successor to Ed. Greutert & Cie., the relation of the three companies to one another and to other companies, *including, on information now available, I.G. Farben and other German interests,* cannot be said by us to be erroneous." (Emphasis supplied.)

As we have heretofore indicated, it was this confused state of affairs that prompted petitioner to urge the District Judge to make findings of fact, since petitioner believed that the six paragraphs appearing in his opinion of February 19, 1953, (111 F. Supp. 440-1; J.A. 611-613), relied upon by the Court of Appeals on page 10 of its slip opinion (R. 1928),[12] and analyzed by petitioner in its petition for rehearing, *infra,* Appendix B, pp. 10a-13a, could not possibly be sufficient. As petitioner stated in its petition for rehearing, (p. 16a, *infra,* Appendix B):

> "We repeat that the six paragraphs in the lower court's opinion of February 19, 1953, heretofore analyzed, do not establish 'control' and mostly do not even relate to the subject; they not only lack 'definiteness', but are beside the point at issue; and the conclusion of 'control' finds *no* support in the record."

Rule 52(a) Fed. R. Civ. P. provides, *inter alia,* that—

> "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

But the District Judge did not consider that findings of fact appeared in his opinion of February 19, 1953, or in any other memorandum for, at the time when petitioner urged him to make findings of fact,

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[12] Since no other part of the District Judge's opinion even remotely refers to any evidence *relating to control,* petitioner assumes that the Court of Appeals must have reference to the six paragraphs. These six paragraphs begin on page 440 of 111 F. Supp. (J.A. 611), directly following a paragraph whose concluding clause is "but since then other facts bearing upon the question have been introduced into the record."

the Judge stated in his memorandum of December 21, 1953, (J.A. 677-678) that "It therefore appears unnecessary * * * to make findings of fact."

It may be said that Rule 52(a) Fed. R. Civ. P., which requires findings of fact "in all actions tried upon the facts without a jury", is not applicable. That viewpoint is apparently based upon a technical and narrow interpretation of the rule. The cases are legion wherein appellate courts have required findings of fact upon complicated issues of fact, whether technically within or without the requirements of Rule 52.

In *Hurwitz* v. *Hurwitz,* 78 App. D.C. 66, 136 F. 2d 796, the United States Court of Appeals for the District of Columbia Circuit said:

> "The duty of the trial court to make findings of fact should be strictly followed. * * * Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case."

See, also, *King* v. *Wall & Beaver Street Corporation,* 79 U.S. App. D.C. 234, 145 F. 2d 377 in which the same court pointed out the requirement and need for findings of fact in connection with preliminary hearings which it described as "separate trials of separate issues."

While the above cases were decided before the amendment of Rule 52(a),[13] decisions after the amend-

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[13] The 1948 amendment added two sentences, the second of which provides: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 [Defenses and

ment make it clear that in complicated cases, where the facts are susceptible of different inferences, findings of fact are required of the trial court. In *Winter Park Tel. Co.* v. *Southern Bell. Tel. & Tel. Co.*, 181 F. 2d 341, the United States Court of Appeals for the Fifth Circuit so held with respect to a summary judgment granted for the plaintiff without any express findings of fact or conclusions of law.

In *Koehler* v. *United States*, 200 F. 2d 588, the United States Court of Appeals for the Seventh Circuit commented upon the provision of the Rule permitting the inclusion of findings in the opinion, with the statement that:

> "this provision does not relieve the trial judge of making *adequate* findings. *Life Savers Corp.* v. *Curtiss Candy Co.*, 7 Cir., 182 F. 2d 4, 6. The practice of commingling findings of fact and conclusions of law with other portions of an opinion is a practice that should be discouraged. It is almost inevitable that if findings of fact and conclusions of law are mixed up with the observations and arguments of the judge writing the opinion, such findings and conclusions are more likely to be inadequate than if the findings and conclusions of law are separately and definitely stated." (p. 592) (Emphasis supplied)

Objections] or 56 [Summary Judgment] or any other motion except as provided in Rule 41(b) [Involuntary Dismissal]."

The dismissal in this case is claimed by the Court of Appeals to be under Rule 41(b). A 1948 amendment to that Rule added, *inter alia*, the following: "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." There was an adjudication on the merits here. (See footnote 11 on page 16, *ante*.) Thus, it is clear that findings are required in this instance, as a matter of law.

In *Dearborn National Casualty Co.* v. *Consumers Petroleum Co.*, 7 Cir. 164 F. 2d 332, 333 the court stated as follows:

> "The court made an ultimate finding of fact * * * but no subsidiary findings of fact were made to indicate upon what findings this conclusion of ultimate fact was based. There must be such subsidiary findings of fact as will support the ultimate conclusion reached by the court."

There is nothing whatever in the District Court's opinion of February 19, 1953, to indicate the subsidiary or supporting facts upon which it reached the conclusion that appellant had the Sturzenegger records in its "possession, custody or control". The judge set forth no evidence, no testimony, no supporting findings that would permit it to convert a *prima facie* conclusion of "control" into an ultimate, final finding upon that vital issue.

Without such findings, either separately or in the opinion below, the Court of Appeals had no basis upon which it could really review the conclusion and judgment of the lower court with respect to the order for discovery. It was left only to speculate as to what influenced the trial judge and whether he based his conclusion upon facts actually proved and in the record. Indeed, the Court of Appeals seems to have disposed of the problem by placing complete reliance in their assumption that the District Judge had a "thorough acquaintance with the case in its various stages over a period of years." (p. 10 slip op.; R. 1928). While petitioner disputes such assumption—see footnote 6 on page 12a, *infra*, Appendix B, Petition for Rehearing in

Banc—petitioner respectfully points out that if appellate courts may make and rely upon such assumptions, the requirement for findings of fact could be nullified.

As this Court has recently said in a similar situation:

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."
>
> *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256, 92 L. Ed. 1347, 1350.

Thus, petitioner submits, the District Court so far departed from the accepted and usual course of judicial proceedings, and the Court of Appeals so far sanctioned such a departure, as to call for an exercise of this Court's power of supervision.

Both lower courts erroneously applied the Federal Rules of Civil Procedure in a novel way and in violation of the due process clause

The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court; and has also decided a federal question in a way in conflict with an applicable decision of this Court.

On page 14 of the slip opinion (R. 1932), the Court of Appeals stated:

> "Rule 37 apart, Rule 41(b) would permit dismissal for 'failure' of the plaintiff to comply with an order of the court, thus reflecting the power thought

by the Rule framers to reside in the court aside from the specific confines of Rule 37." [14]

Under a doctrine which the Court of Appeals calls "accepted procedures" (pages 16 and 17 slip opinion; R. 1934-5),[15] mere failure to comply with a discovery order forfeits a plaintiff's right to go to trial. In other words, once eligible documents are declared to be in the possession, custody or control of a litigant, and a discovery order has issued, nothing thereafter excuses a failure to produce.

This is a novel decision. The District Judge so announced. (111 F. Supp. 444, 447). And the Court of Appeals has cited no judicial precedent or even a text writer in support of it.

This is not a case in which the defaulting party has offered no excuse, or a factually inadequate one. On the contrary, the Special Master reported without qualification the inability of petitioner to perform through absolutely no fault of its own, and the District Judge ratified that conclusion on the Master's part (111

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[14] In the light of the *Hammond Packing* case, Rule 41(b) can be no broader than Rule 37(b)(2)(iii), and it is subject to the same infirmity, namely, the denial of due process. Also, if faultless non-compliance on the part of a *defendant* occurred under the same circumstances as this case, Rule 41(b) would provide no reservoir of power to strike a defense, and neither Rule 55(a) nor any other Rule provides for the entry of a default in such a situation. Thus, if Rule 41(b) were construed to be applicable, it would necessarily produce the strange result of compelling discovery by a plaintiff or otherwise he would be subject to dismissal, with no comparable provision applicable to a defendant if he should fail to give discovery.

[15] "for developing the truth about contested factual issues • • •, the ultimate objective of the trial."

F. Supp. 440); and the Court of Appeals concurred in that result. (p. 13 slip op.; R. 1931). As clearly recognized by everyone, the Swiss Government, in the exercise of its "preventive police power",—*a force majeure*—placed it beyond the ability of petitioner in a physical sense to exhibit the Sturzenegger documents to respondents. (See pp. 4-5 slip op.; R. 1922-3).

Tested by the most elementary principles, the decision of the lower courts is unsound. The situation in the case at bar is wholly unlike any of the examples given by the District Judge (111 F. Supp. 446):

> "If plaintiff had failed to file a complaint seasonably within the time allowed by law, or had failed to state sufficient facts to show the pleader was entitled to relief, or had filed the complaint before a Court without jurisdiction of the parties or the subject matter, the same result would follow."

In order to dilute the startling effect of its decision, the Court of Appeals equates the action of petitioner's sovereign with fault of petitioner. This, too, is a novel proposition.[16] It is obviously not akin to the inapplicable doctrine that the forum determines the privilege, since neither a claim of privilege has been raised by petitioner (see footnote 13, p. 10, slip op.; R. 1928), nor does it lie in the physical power of petitioner, as it did in the *Prize Cases*,[17] to make discovery.

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[16] With the greatly increased use of discovery procedures under the Federal Rules of Civil Procedure, this question can arise frequently in the future in view of the attitude of foreign governments toward such a situation. *Cf.*, e.g., *Securities and Exchange Commission* v. *Minas de Artemisa, S. A.*, 150 F. 2d 215 (C.C.A. 9th, 1945).

[17] Discussed by the Court of Appeals beginning on page 19 of its slip opinion (R. 1937).

The Court of Appeals concedes that its reasoning must be squared with due process (see p. 14, slip op.; R. 1932), and apparently recognizing the full force of the *Hammond Packing* case, immediately proceeds to ignore it.[18] That the lower court *read* that case as petitioner does, is demonstrated on page 12 of the slip opinion (R. 1930):

> "*Hammond Packing Co.* v. *Arkansas* involved a refusal to produce which the Court termed a 'failure by the defendant to produce what we must assume was material evidence in its possession', and which defendant *had the power to produce.*" (Emphasis supplied)

It is clear from *Hammond Packing* that the constitutional right to strike the defense was based upon a pre-

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[18] Indeed, it would seem that the Court of Appeals is saying that the District Court had the power to take any action it saw fit, without specific authorization *by rule or statute*, provided only that it did not violate constitutional inhibitions. In this, it is going contrary to the thesis in *Hammond Packing Co.* v. *Arkansas* that there was no common law right or power of the Court to require discovery under the pain of possible dismissal or striking of a defense. Such power this Court found to rest with the legislature, which it held could create a rebuttable presumption of bad faith by the party refusing to produce the evidence.

The source of power of the Federal Rules of Civil Procedure is the Act of Congress of June 19, 1934, 48 Stat. at L. 1064, Ch. 651, now 28 U.S.C. § 2072. Such rules may not become effective until the close of the session during which they have been reported to Congress. The district courts have no authority to alter or enlarge upon these Rules in any way. The decision of the Court of Appeals that the District Court had power apart from and in addition to the Rules, to impose further requirements on the plaintiff "not inconsistent with accepted procedures", ignores the fundamental fact that the source of this power is legislative in origin.

sumption of fact—as to the bad faith and untruth of an answer—begotten from wilfulness, or, perhaps, carelessness. There, the defendant had the power to produce. This was expressly recognized by the Court of Appeals in the case at bar in discussing that case. "Failure" in the *Hammond Packing* case was used synonymously with "suppression"; while "failure" in the instant case means "through no fault of petitioner."

A presumption of bad faith can only arise or be created where the circumstances are reasonably susceptible of it. *Cf., Tot* v. *United States,* 319 U.S. 463, in which this Court stated (p. 467):

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

The Court of Appeals recognizes the weakness of its position by stating (p. 18, slip op.; R. 1936) that it "does not lean heavily upon the theory of a factual presumption." But, then it further expresses itself upon the same subject by stating that "there may be some element of adverse factual presumption." Petitioner submits that, under the *Hammond Packing* case, if the presumption does not and cannot arise in its entirety, a clash with the due process guarantee cannot be avoided.

Thus, the Court of Appeals decision is impaled upon the horns of a dilemma. If the presumption cannot properly arise, there may be no lawful dismissal of an action or striking of an answer, as the case may be; but for it properly to arise, there must be a failure to comply through some kind of fault which reflects bad

faith. Since, petitioner respectfully submits, the presumption cannot properly arise here, there may be no dismissal without violating "due process."

As indicative of the "extremes" to which the lower courts have gone in this case, there has been a dismissal *with* prejudice in a case where the party was free from fault, and, as well, an adjudication on the merits, since the dismissal so "operated" pursuant to Rule 41(b).[19] The legal effect is not only that petitioner may never refile its action, but that for purposes of *res judicata* petitioner is enemy-tainted and did not own the property.[20] The latter effect can come about *only* because petitioner's complaint is taken as untrue, since its allegations—not yet tried—are to the contrary.

Therefore, the presumption described in the *Hammond Packing* case has been fully invoked in a situation where there is, in fact, no bad faith, no proof of enemy-taint or lack of ownership, and no wilfulness in not obeying a discovery order.

Under Hickman v. Taylor the District Court should have reappraised its discovery order regarding the element of need when substantial production occurred

In the decision of the District Judge, the following is stated (111 F. Supp. 447; J.A. 626):

> "The attention of the Court has been directed to a statement of the Swiss Federal Attorney on

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[19] Petitioner sought to have the District Judge "otherwise specify", as provided in Rule 41(b), in order to avoid having the dismissal operate as an adjudication on the merits, (J.A. 674), but he declined to do so. (J.A. 678).

[20] These are the issues upon the merits of the case.

June 25, 1951, as reported in the findings of the Special Master:

> '. . . we are prepared to release individual documents proved to be indispensable for the suit, insofar as explicit statements are produced for each one of these documents by all the parties having an interest in them (banking firm H. Sturzenegger & Co., its clients and other individuals or juridical persons participating), from which it should be clearly evident that there is neither a violation of Art. 273 St. GB (economic espionage) nor of Art. 47 of the Bank Law (bank secrecy). The Office of the Swiss Federal Attorney explicitly reserves itself the right to refuse to release individual documents without stating grounds for this.'
>
> "* * * this Court is of opinion it should extend further opportunity to plaintiff to comply with the order to produce the documents designated. * * *"[21]

During the period of such extensions, petitioner sought and obtained numerous waivers from the bank's customers, and over 63,000 documents were released and brought to the United States. These were tendered to respondents who refused to examine them because they did not constitute *full* discovery. (Recital of these

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[21] Petitioner moved the District Court to require respondents to cooperate with petitioner in the preparation of applications for submission to the Swiss Federal Attorney for the release of documents, (J.A. 598), so that there could be mutual aid in trying to accomplish the desired result. Respondents resisted the motion and the District Judge denied it. (J.A. 627).

details appears on pages 5 and 6 of the slip opinion of the Court of Appeals, R. 1923-4.)[22]

Both lower courts ignored these 63,000 papers for the sole reason that they were not *all*. Petitioner urged the District Judge to require respondents to examine them upon the ground that such a vast quantity was substantial compliance, and it was possible that respondents might come to the conclusion that they could gain from such documents all the information they might need. It was petitioner's contention that after inspection by respondents, the judge could then reappraise the all-important element of need.

On page 16 of its slip opinion, (R. 1934), the Court of Appeals reasons that "Uncertainty as to the part the undisclosed papers would play creates the difficulty;" and on page 18, (R. 1936), that it relies in its decision "chiefly on the necessity for discovery as an aid in the development of facts."

Surely, the 63,000 documents are not "undisclosed papers," and no court can state, without looking, that they would not constitute "an aid in the development of facts."

This, petitioner respectfully submits, is quite comparable with the kind of situation which confronted this Court in *Hickman* v. *Taylor,* 329 U.S. 495, when, on page 512, it was stated:

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[22] On page 6 of the slip opinion, (R. 1924), the Court erroneously indicates that *petitioner* had made full production of the Sturzenegger papers upon an earlier investigation by the Swiss Government itself. Upon that investigation, implemented by Swiss war-time laws, the Swiss Government had direct access to the Bank's papers, not *via* petitioner, as in the case at bar. (See Petition for rehearing, p. 10a, *infra,* Appendix B.)

> "There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved."

While, upon the facts of the *Hickman* case, the work-product and privilege of a lawyer were particularly involved, the case equally lays down a clear doctrine placing emphasis upon the element of need in discovery proceedings under Rule 34, Fed. R. Civ. P. On page 509, this Court stated:

> "We are thus dealing with an attempt to secure production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh *without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardships or injustice.* For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking."[23] (Emphasis supplied.)

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[23] Besides the 63,000 documents referred to above, respondents had the following: Some 23,000 relevant documents found by respondents in Germany, Holland, United States and elsewhere (see J.A. 196); all of petitioner's papers—of which 70,000 microfilms were taken; the 6,000-page deposition of Dr. Sturzenegger, the head of the Sturzenegger Bank; depositions of Messrs. Merton, (J.A. 1826), Euler (J.A. 1865), and Schmitz (J.A. 1908); and a legion of living persons who are available as witnesses. The deposition of two of petitioner's leading figures—President Iselin and Director August Germann—were noticed by respondents but never taken. (J.A. 164).

On November 16, 1953, the District Judge wrote (J.A. 672):

> "Upon review of the proceedings in this case, and particularly developments since the last extension of time granted plaintiff to produce documents and records called for originally by order dated July 5, 1949, the Court is of opinion there is no reasonable likelihood plaintiff will be able to accomplish the full production required by law."

In effect, he thought that petitioner would be incapable of producing the balance of the Sturzenegger documents because they were impervious, for one reason or another, to the waiver procedures which petition had initiated at the suggestion of the Swiss Federal Attorney. At that apparent impasse, a sound discretion, petitioner submits, called for an inquiry as to whether anything further was needed, or, stated conversely, whether, as in the *Hickman* case, the papers not produced were necessary or the denial of their production would unduly prejudice the preparation of respondents' defenses or cause them any hardships or injustice.[24]

What underlies this entire case is the insistence of the two lower courts and the respondents—called by the Court of Appeals "accepted procedures"—that 100% discovery from a party's opponent is a *matter of right.* This Court held to the contrary in the *Hickman* case: and the principle of reasonable

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[24] It should be remembered that petitioner had moved for reconsideration of the original discovery order of July 5, 1949, before the District Court's decision of February 19, 1953, (J.A. 611), and had moved to be relieved from the status of default after the production of the 63,000 documents. (J.A. 663). Thus, the question regarding the element of *need* under Rule 34 continued to be before the judge up to the moment of actual dismissal.

alternative procedures was similarly recognized—again in the face of a demand for discovery "as of right"—by the Second Circuit Court of Appeals in *Hyam* v. *American Export Lines,* 213 F. 2d 21, in an opinion written by then Circuit Judge Harlan. How prophetic are his concluding words in their application to the case at bar, as follows:

> "The federal courts are open to foreign suitors as to others, and procedural rules are not to be construed in such fashion as to impose conditions on litigants which in their practical effect amount to a denial of jurisdiction. See *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U.S. 629, 44 S. Ct. 220, 68 L. Ed. 480."

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted, because the summary determination of the issue of control without a proper hearing, the refusal to consider the question of need, contrary to *Hickman* v. *Taylor, supra,* and the novel construction of the Federal Rules of Civil Procedure as authorizing dismissal of the complaint for non-compliance with the discovery order through no fault of the petitioner, contrary to *Hammond Packing Co.* v. *Arkansas, supra,* amount to a taking of petitioner's property without due process of law, and warrant the exercise of this Court's power of supervision.

Respectfully submitted,

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October 31, 1955

APPENDIX A

CONSTITUTIONAL PROVISION

Amendment V

"* * * nor shall any person * * *; * * * nor be deprived of life, liberty, or property without due process of law; * * *"

STATUTES

Trading With the Enemy Act. Section 5(b)(1) Title 50. U.S.C. App. 5(b)(1)

§ 5. Suspension of provisions relating to ally of enemy; regulation of transaction in foreign exchange of gold or silver.

* * * * * * * * * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the Presi-

dent, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

* * * * * * * * * * *

Trading With the Enemy Act, Section 9(a)
Title 50, U.S.C. § 9(a)

§ 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover.

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall

have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6 and 7-39 of this Appendix] and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * * * * * * *

RULES

Rule 30(b), Federal Rules of Civil Procedure

Depositions Upon Oral Examination.

* * * * * * * * * * *

(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present, except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

* * * * * * * * * * *

Rule 34, Federal Rules of Civil Procedure

RULE 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the exam-

ination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. As amended Dec. 27, 1946, effective March 19, 1948.

Rule 37(b), Federal Rules of Civil Procedure

RULE 37. Refusal to Make Discovery: Consequences.

* * * * * * * * * *

(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence or physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

* * * * * * * * * *

Rule 41(b), Federal Rules of Civil Procedure

RULE 41. Dismissal of Actions

* * * * * * * * * *

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 52(a), Federal Rules of Civil Procedure

RULE 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the ground of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are necessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Rule 55(a), Federal Rules of Civil Procedure

RULE 55. Default

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

APPENDIX B

Petition of Appellant for Rehearing in Banc (Filed July 15, 1955)

The appellant hereby petitions the Court for a rehearing *in banc* in respect of the decision and opinion of the Court of June 30, 1955 (Circuit Judges Wilbur K. Miller, Fahy and Danaher), upon the following grounds:

In its opinion the Court first approves the lower court's determination that the Sturzenegger papers were and are in the *primary*[1] possession, custody and control of the appellant. From there, the Court proceeds to discuss the power of dismissal, in the absence of fault or wilfulness, in relation to the rules of court and to the constitutional guarantee of due process, and reaches the conclusion that although at the moment when performance was required a barrier stood in the way, as effective as fire or other catastrophe, "accepted procedures" preclude appellant from being allowed "to go to trial." (p. 16 slip op.) And a careful reading of the opinion fails to disclose even one single allusion to "good cause"—need—which this Court once felt was one of the most important prerequisites to discovery under Rule 34 Fed. R. Civ. P., (*Martin* v. *Capital Transit Company,* 83 U.S. App. D.C. 239, 170 F. 2d 811), despite the fact that some 63,000 Sturzenegger papers remain untouched by a defendant who pretends to be searching for evidence of "enemy taint." These could hardly be amongst the "undisclosed papers" to which the Court referred twice on page 16 of its opinion; nor does appellant find it thus far stated anywhere that such papers could not be "an aid in the development of facts" (p. 18 slip op.),[2] especially in view of the thousands upon thou-

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[1] By the use of the word "primary", appellant means "inherent" or "fundamental" as distinguished from the control which was lost when the Swiss confiscation order was executed.

[2] In footnote 7 on page 6 of the Court's opinion, it is stated that it is not clear what percentage of the papers ordered produced by the July, 1949 order was represented by the 63,000 documents tendered. At least the quantity is in excess of the figure of 55,500, (J.A. 235) which was in Judge Laws' mind at the time of the order. (J.A. 340).

sands of other relevant documents which the Custodian has garnered from other sources. (See pages 17-18, appellant's main brief.)

It is clear from the opinion that if appellant did not have primary control[3] over the Sturzenegger papers, this Court would have set aside the dismissal order and nothing further would or need have been decided. Therefore, appellant first submits that the Court committed serious error in affirming Chief Judge Laws upon this point, as well as in the manner in which it dealt with the question.

I

Either Judge Laws' Decision Upon Primary Control Should Be Reversed, or the Case Should Be Remanded for Adequate Findings

Two Courts—Chief Judge Laws' and this Court—have now decided that appellant had such "control" over the Sturzenegger papers that its failure to produce them is inexcusable and it will be foreclosed from seeking to recover *its* property of the value of one hundred million dollars, although neither court has given a single reason why such "control" existed.

Two opinions of Judge Laws "touch" upon the problem. One is his opinion of June 23, 1949, (J.A. 335) in which he merely "finds a *prima facie* case of control by plaintiff is made out," (J.A. 338); and the other is his opinion of February 19, 1953 (J.A. 605) in which, after six paragraphs of "other facts bearing upon the question [which] have been introduced into the record," (J.A. 611), he states (J.A. 615): "On further consideration, the Court now definitely concludes that the Sturzenegger papers were

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[3] At the top of page 12 of the Court's opinion it is stated that "physically the papers remained in the possession or custody of Chemie." Appellant assumes that this means because of its alleged "control" over them, for upon no theory whatsoever were the Sturzenegger papers ever in appellant's physical possession or control.

and are in the possession, custody or control of the plaintiff * * *."

The six paragraphs to which appellant refers above are found at pages 611-613 of the Joint Appendix. There is not a single fact stated in those six paragraphs from which a conclusion of appellant's control over Sturzenegger could be reasonably inferred. They may be analyzed as follows:

First paragraph: This merely states that Sturzenegger is in both companies and the dominant personality in the Bank.

Second paragraph: This merely shows that in the Sturzenegger partnership, Sturzenegger was the unlimited partner, Industriebank the limited partner and appellant a "sleeping partner." (Prior to May 27, 1949, the important thing is that appellant's interest was 18%—not 44% "until 1943".) It is true that Industriebank was the dominant stockholder in appellant, but that has nothing to do with "control" over Sturzenegger. The fact that Industriebank "forms a link," with three other companies, "in a tight chain of control," is entirely beside the point. It is *not* control over the Sturzenegger Bank or its papers.

Third paragraph: The interdependence of the four firms mentioned has nothing to do with the question of appellant's "control" over the Greutert/Sturzenegger Bank. See our main brief, pp. 23-26 and 54-56.

Fourth paragraph: In this paragraph Judge Laws states that at the time of the Swiss Compensation Office investigation, "[N]o objection was then raised that the documents of H. Sturzenegger & Cie were not in the possession, custody or control of I. G. Chemie." The fact of the matter is that the Swiss Compensation Office did not approach the Sturzenegger papers *through* Chemie, as Judge Laws attempted to do, but acted directly *at and toward* Sturzenegger. This is alluded to again by Judge Laws in his memorandum of November 16, 1953, which this Court picked up on page 6 of its opinion.

Fifth paragraph: This paragraph merely states that appellant's investments were managed by Sturzenegger, and that the two are in close physical proximity. It then proceeds to discuss a situation "until 1940"; and returning to the present tense, refers to ownership of appellant's stock—not control over Sturzenegger.

Sixth paragraph: In this paragraph, Judge Laws arbitrarily overrides the express language of the partnership agreement.[4]

Just before expressing his "definite conclusion" (J.A. 615), Judge Laws wrote (J.A. 615): "Through the interlocked web of corporate organization, management and finance there runs the thread of a fundamental identity of individuals in the pattern of control." Appellant says respectfully yet emphatically that these are mere words and that there is not a scintilla to support the statement if it refers to a "pattern of control" over the Sturzenegger papers.

The foregoing is all that the lower court said upon the subject, and represents the totality that this Court may look to as from the "finder of the facts."

Now, let us see what this Court said on pages 9 and 10 of its opinion in relation to the foregoing.

First, it is stated that "we accept the express conclusions of Chief Judge Laws" as to control. But, we submit, the "express conclusions" cannot be accepted unless they are supported by the facts.

Secondly, it is stated that the conclusions "are set forth clearly and with sufficient fullness" in the February 19, 1953 opinion. Unless they appear in the six paragraphs, they are not there, and we submit that they are hardly "set forth clearly and with sufficient fullness" in those paragraphs. Thus, this Court abstains from elaborating

[4] See footnote 19 on page 13 of appellant's Reply Brief. Indeed, appellant respectfully requests the full bench to read, in conjunction generally with this Petition, the entire Reply Brief.

"again the factual details." Indeed, appellant submits that the "factual details" have not been stated even once by the lower court.

Thirdly, in pointing to "the narration in Chief Judge Laws' opinion," this Court states that it "cannot be said by us to be erroneous." The "narration" may not be erroneous,[5] but the importance and force of the "facts" therein mentioned are wholly beside the point and have nothing to do with the question of appellant's "control" over the Sturzenegger papers.

Fourthly, this Court sums it all up by referring to Judge Laws' "thorough acquaintance with the case in its various steps over a period of years."[6] In this connection appellant refers the Court to the first full paragraph and footnote 4 on page 3 of the Reply Brief and footnote 22 on page 15 of the Reply Brief. Appellant adds that none of the exhibits to the Sturzenegger deposition—see volume IV of the Joint Appendix—were ever physically at the Court House—much less before the Judge—until the record was assembled for filing with this Court on this appeal. But, more importantly, we respectfully submit that Judge Laws' "thorough acquaintance" with the facts relating to "control" should be actually reflected by him in the record, and not merely assumed by this Court.[7]

Fifthly, this Court states that Judge Laws' "finding" rests upon a "discussion" of the evidence which traces the

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[5] Appellant does not understand the justification in this statement of the reference of this Court to "I. G. Farben and other German interests." The subject there under discussion is "control" of the Bank by appellant, not relevancy and materiality of the papers.

[6] It is the Special Master who has the "thorough acquaintance" with this case below. Judge Laws referred the case to him in 1950 in a plenary order and much of the Master's time since has been occupied with the case. Judge Pine was selected to be the "special judge" for this case. Chief Judge Laws has had only the discovery motions and their related phases.

[7] On page 22 of its opinion, this Court again refers to the District Court having "become thoroughly acquainted with the factors which led to its decision."

history of the close connection between appellant and the Sturzenegger Bank. Such "discussion" must be contained in the "six paragraphs," *supra*, for otherwise there is none, and we submit that such "discussion" as there is does not lead to a result of "control."

And lastly, this Court states:

> "For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and, for purposes of our favorable review, find adequate support in the record."

The foregoing quotation suggests that findings for the purpose of Rules 34 and 37 may be less than for usual purposes. This seems hardly correct to appellant when the "findings" form the predicate for the drastic and final action taken in this case.

Appellant appreciates that an appellate court is not expected to cite "chapter and verse" when it states that a lower court's findings are supported by the record. However, it is respectfully submitted that a litigant is entitled, by way of an opinion or findings or some other judicial product, to know from some court the reasons underlying and justifying a judgment; and appellant submits that the proceedings in both courts leave unstated or undisclosed the facts upon which a determination could be made that it has "control" over the Sturzenegger papers.

The Special Master's Conclusion No. 10 (J.A. 547) has not been commented upon by either court. It is as follows:

> "10: The necessity under Swiss law for the waiver by parties—multiple or otherwise—who own the secrets contained in the Sturzenegger papers demonstrates that a holding of *prima facie* control of such papers by the plaintiff within the terms of Rule 34 F.R.C.P., does not fully resolve the problem. If the intervention of a third party, an independent agent, is necessary to produce the papers, then by definition plaintiff has no control over their production."

This was discussed at page 62 of appellant's main brief. If there were no other reason available, this point should

be decisive of the entire matter. Appellant respectfully submits that the point deserved serious consideration, especially since it was obviously aimed at the lower court's decision of June 23, 1949, and was not adversely commented upon by Judge Laws when he ratified the Special Master's Report, Findings, and Conclusions in their entirety. *Standing alone, appellant submits, such a conclusion requires reconsideration of the decision of the division of this Court.*

The undersigned deliberately and seriously submit to this Court that, in view of the character of the proceedings below, and of the nature of the record which has been brought here, this case presents to this Court a travesty upon the administration of justice, the like of which it would be difficult to duplicate in the annals of Anglo-Saxon law.

There was no hearing below at which witnesses testified. Documents were referred to in briefs and memoranda,[8] and were neither offered in evidence nor shown to the District Judge. (See footnote 22 on page 15 of the Reply Brief.) Portions of depositions, referred to by the Government in its brief in this Court, were never called to the attention of the lower court. Exhibits to deposition—never identified by the deponent—were not even shown to the lower court, but are printed in this record—see volume IV of the Joint Appendix—in order to attempt to prejudice this Court against appellant.[9] This Court has

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[8] This Court has condemned this practice in at least two cases—*Sardo* v. *McGrath*, 90 U.S. App. D.C. 195, 196 F. 2d 20; and *Goldman* v. *Summerfield*, ... U.S. App. D.C. ...., 214 F. 2d 858.

[9] In this connection, we refer to the phrase "on information now available" appearing upon page 10 of this Court's opinion, and the suggested relationship to "I. G. Farben and other German interests."

Some examples of such "exhibits,"—which have not even been *identified*—were *printed at the request of the Custodian*, and are found at J.A. 1705-1727. See Record 11153, 11159, 11421, 11538, 11545. The witness, when shown or asked about such documents or their contents answered that he did not know or recollect. See, e.g. R. 11161.

seen depositions of Government witnesses (Merton, J.A. 1826; Euler, J.A. 1865; and Schmitz, J.A. 1908), although they were not offered in evidence below and no judge has had occasion to rule upon appellant's many objections appearing therein. Affidavits of Messrs. Sturzenegger and Germann (J.A. 396-397), touching squarely upon the question of "control", appear to have been totally ignored by Judge Laws. We asked the lower court to make findings so that both this Court and the parties could see precisely what the Judge was relying upon, but he refused to do so. It is just as important for the parties, as for the reviewing court, that adequate and proper findings be made. *Saginaw Broadcasting Company* v. *Federal Communications Commission*, 68 App. D.C. 282, 287, 96 F. 2d 554, 559, certiorari denied, 305 U.S. 613.

This Court speaks about Judge Laws tracing "the history of the close connection between I. G. Chemie and H. Sturzenegger & Cie;" and implies that such tracing finds adequate support in the record (p. 10, slip op.). Where, appellant asks, is this found in the record? If the Swiss Compensation Office reports are relied upon for this (J.A. 205-324), appellant replies that the statements therein made were not evidence before the lower court.

We remind the Court of what it said in *Saginaw Broadcasting Company* v. *Federal Communications Commission, supra*:

> "The requirement that courts, and commissions acting in a quasi-judicial capacity shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, *rather than arbitrarily or from extralegal considerations;* and findings of fact serve the additional purpose, where provisions for review are made, *of apprising the parties* and the reviewing tribunal of the factual basis of the action of the court or commission, *so that the parties* and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law or, on the contrary, *upon arbitrary or extralegal considerations.* When a decision is accompanied by findings of fact,

> the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, *it is to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law.*" (Italics supplied).

Appellant submits that the phrases "arbitrary or extra-legal considerations," and "to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law," find an affinity in the sweeping and factually-unsupported "definite conclusion" of "control" reached by the lower court. We repeat that the six paragraphs in the lower court's opinion of February 19, 1953, heretofore analyzed, do not establish "control" and mostly do not even relate to the subject; they not only lack "definiteness" but are beside the point at issue; and the conclusion of "control" finds *no* support in the record.

Yet, the right to maintain an action to recover property valued at $100,000,000 is turning on such a record and disposition of a case. It would seem that proper judicial approach, instead of resolving every inference against a plaintiff in such a situation, would require the highest and strictest standards of consideration, holding the lower court to a rigid accountability for its determination and not placing reliance upon an assumption of a "thorough acquaintance" by the District Judge with a case; especially, an assumption that is not borne out by the judicial product which he put forth.

Courts have required far more in far less important cases. At least one member of the Supreme Court finds that a "stupendous" sum of money is an element of consideration, especially in connection with a determination as to whether a hearing *in banc* should be authorized. In *West-*

ern P. R. Corp. v. *Western P. R. Co.*, 345 U.S. 246, Mr. Justice Frankfurter, in a concurring opinion, stated at page 270:

> "Hearings en banc may be a resort also in cases extraordinary in scale—either because the amount involved is stupendous or because the issues are intricate enough to invoke the pooled wisdom of the circuit."

The undersigned counsel have no hesitancy whatever in executing the subjoined certificate to the effect that this petition for rehearing is presented in good faith and not for delay. Indeed, it is seriously and sincerely submitted that, in light of the foregoing, the members of the division of this Court who participated in the instant opinion should reexamine Judge Laws' opinions of June 23, 1949 and February 19, 1953, in order to verify the representations which we are now making to the Court—as we have previously done—that the established facts before the court below do not support a determination of "control" by the appellant over the Sturzenegger papers, and that what Judge Laws has attempted to write factually upon this subject either misses the point or disregards the evidence.

II

The Instant Decision Is in Conflict With a Prior Decision of This Court

In *Duell* v. *Duell*, 85 U.S. App. D.C. 78, 178 F. 2d 683, this Court held, in a majority opinion written by Circuit Judge Wilbur K. Miller, that if a defendant is incapable of producing documents, his answer could not be stricken and default could not be entered against him for failure to obey a production order of the court.

In the case at bar, in the same situation, dismissal of a plaintiff's suit is affirmed.

III

The Opinion Constitutes a Clear Denial of Due Process in the Circumstances of This Case

This Court, on page 13 of its opinion states that *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322, "seems inapplicable."[10]

Then, when we turn to page 18 of the opinion, it is stated, that "our view * * * does not lean heavily upon the theory of a factual presumption adverse to the one who fails to produce the papers ordered * * *." This is followed by the statement that "there may be some element of adverse factual presumption." We cannot help but draw the conclusion from these two statements that the factual presumption *is* being relied upon.

What is the presumption of which the Court is speaking? It is of bad faith and untruth of a pleading begotten from wilfulness in not complying with a production order. Obviously, such a presumption could not spring from an involuntary inability to perform.[11] The Court said as much on page 13 of its opinion. Then why does the Court lean upon it, even though not "heavily"?

We think the Court has, in effect, invoked the presumption in its entirety, thus impinging upon the *Hammond Packing* doctrine, with the result that there has been a violation of the due process guarantee. We also think that this conclusion on our part is supported by Circuit Judge Wilbur K. Miller's reasoning in *Duell* v. *Duell, supra.* Our own reasoning is as follows:

The Court relies upon Rule 41(b) Fed. R. Civ. P. for the dismissal for "failure" to comply. That rule provides that a dismissal thereunder shall constitute an adjudication on the merits unless otherwise specified by the court. We sought to have Judge Laws otherwise specify. (J.A. 674) He declined to do so. (J.A. 678). The result is that

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[10] We are not sure why the Court says "seems." Is the Court uncertain of the point?

[11] See our main brief, page 109 *et seq.*

the dismissal in this case constitutes an adjudication on the merits.

What are the "merits" of this case? Two issues were framed by the pleadings, as pointed out by this Court on pages 2-3 of its opinion, namely, enemy-taint and ownership of the vested property. The "adjudication on the merits" has legally the effect of determining for purposes of res judicata and otherwise that appellant is enemy-tainted and did not own the property. This result comes about only because appellant's complaint is taken as untrue, for its allegations—not yet tried—are to the contrary.

Thus, the presumption has been fully invoked in a situation where there is, in fact, no bad faith, no proof of enemy-taint or lack of ownership, and no wilfulness in not obeying a discovery order.

If the Court did not intend to apply *Hammond Packing*, we have demonstrated that it did so, at least, to the extent of permitting the presumption to be raised. If we are correct, and we believe we are, the Court will be in the dilemma created by its own misconception of the situation, namely, that while the Court thought that it was avoiding a conflict with "due process," it was, instead, running headlong into it.

Before concluding this point, we wonder whether the Court is indeed ruling that the presumption is available even in the facts of this case; that is to say, that it may be properly invoked in a situation of involuntary inability to comply. Our main brief takes issue with such a doctrine, and we submit that the Court would commit grievous error in following that course of reasoning, not to mention the fact that Judge Miller, we feel, strongly declined to accede to any such theory in the *Duell* case.

If the Court means to embrace this latter theory, and will not abandon it upon this petition for a rehearing, may we ask that an addendum be made to the opinion to this effect, so that the question may be squarely presented to the Supreme Court. We believe this Court will agree with us that its language—to which we referred at the beginning

of this point in our petition—is unclear and leaves the reader to speculate as to what is the intention of the Court in this respect.

For the foregoing reasons, it is respectfully submitted that appellant is entitled to a rehearing *in banc*.

We, Roger J. Whiteford and John J. Wilson, attorneys for appellant, hereby certify that this petition for a rehearing *in banc* is filed in good faith and not for delay.

ROGER J. WHITEFORD
JOHN J. WILSON
Attorneys for Appellant

I hereby certify that on the 15th day of July, 1955, I caused copies of the foregoing Petition for Rehearing in Banc to be delivered to the office of Hon. Dallas S. Townsend, Assistant Attorney General, Office of Alien Property, Washington, D. C.

JOHN J. WILSON

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12140

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S.A., ETC., APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

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Decided June 30, 1955

Mr. John J. Wilson, with whom *Mr. Roger J. Whiteford* was on the brief, for appellant.

Assistant Attorney General Townsend, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of Court, and *Mr. David Schwartz,* Attorney, Department of Justice, with whom *Messrs. George B. Searls, Sidney B. Jacoby, Paul E. McGraw* and *Ernest S. Carsten,* Attorneys, Department of Justice, were on the brief, for appellees.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge*: The District Court dismissed a complaint filed therein by I. G. Chemie [1] against the At-

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[1] We use this designation, or Chemie, for brevity in referring to the plaintiff in the District Court, the appellant in

torney General of the United States, as successor to the Alien Property Custodian, and the Treasurer of the United States.[2] The complaint was filed October 21, 1948, under the provisions of Section 9(a) of the Trading with the Enemy Act, 40 Stat. 411, 419, as amended, 50 U.S.C.A. App. § 9(a), to recover properties allegedly valued at more than $100,000,000 which the Custodian had vested, under Section 5(b) of the Act and regulations thereunder, as the property of foreign nationals or of German interests.[3] The property vested is over 90% of the stock of General Aniline & Film Corporation, of Delaware, and some $1,800,000 in various bank accounts and securities. I. G. Chemie itself is a Swiss holding corporation having its domicile at Basle, Switzerland. It claims ownership of the vested stock of General Aniline & Film Corporation and of the cash. It asserts that it is not an enemy within the meaning of the Act and, accordingly, availed itself first of the statutory procedure for seeking return of the property by filing an administrative claim with the Custodian. See § 9(a) of the Act. Upon denial of its administrative claim Chemie, as also authorized by § 9(a), sued in the District Court for recovery of the property. The Custodian in his answer denied the property was owned by Chemie and also denied Chemie's allegations that it was not an enemy within

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this court. The fuller name of the party is Societe Internationale Pour Participations Industrielles et Commerciales S.A. and Internationale Industrie- & Handelsbeteiligungen A.G. The plaintiff is also known as "Interhandel".

[2] See Executive Order No. 9788, October 14, 1946, 11 Fed. Reg. 11981. The Attorney General and Treasurer are referred to for simplicity as the Custodian.

[3] See, *e.g.*, Vesting Order of February 16, 1942, 7 Fed. Reg. 1046; Vesting Order No. 5 of April 24, 1942, 7 Fed. Reg. 3148; Vesting Order 907, of February 15, 1943, 8 Fed. Reg. 2453.

the meaning of the Act. The pleadings came to issue on these conflicting claims of ownership and enemy character.

On July 5, 1949, with the pleadings in the situation outlined, the District Court, Chief Judge Laws sitting, on cross-motions, ordered both Chemie and the Custodian to produce for inspection certain documents.[4] Among those ordered to be produced by Chemie were records of H. Sturzenegger & Cie., a Swiss banking concern domiciled, like Chemie, in Basle. Before their production, however, constructive possession of these documents was taken by the Swiss Federal Attorney on June 21, 1950, by his order of June 15, 1950, or, as is sometimes referred to in the proceedings, he seized or confiscated them. His order recited that their production would constitute the fact of prohibited economic espionage under Article 273 of the Swiss Penal Code and would also violate bank secrecy under Article 47 of the Swiss Bank Law "which offense the Federal Authorities have to prevent in order to maintain the public security and order on the basis of their preventive police power". Chemie thereupon, June 22, 1950, moved in the District Court to be relieved of that portion of the order of July 5, 1949, which required it to produce the Sturzenegger records for inspection by the Custodian, stating, as counsel were informed by cable of June 21, 1950, that Sturzenegger & Cie. had been prohibited by order of the Swiss Federal Attorney from delivering its records for such inspection.

On October 31, 1950, the Custodian moved to dismiss the complaint under Rule 37(b)(2), Fed. R. Civ. P., for failure of Chemie to produce the Sturzenegger papers.

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[4] See opinion of Chief Judge Laws of June 23, 1949, *Societe Internationale Pour Par., Etc.* v. *Clark*, 9 F.R.D. 263, 13 Fed. Rules Serv. § 34.11, Case 1 (D.C. D.C.).

The Custodian also filed a motion for such relief as should be deemed just and appropriate, including a ruling that all matters which defendants could possibly show by the papers be taken as proven. This motion stated that because of the seizure the court's order of July 5, 1949, would not be complied with by Chemie in Switzerland, and intimated the seizure was procured, and could be undone, by Chemie.

With the matter unresolved the court by order of March 1, 1951,[8] ordered William J. Hughes, Jr., Esq., as Special Master to hold proceedings and take evidence as to the good faith of Chemie in its efforts to comply with the production order of July 5, 1949, and directed him to report his findings and conclusions to the court for consideration in connection with Chemie's motion, filed November 28, 1950, for reconsideration of its motion of June 22, 1950, to be relieved of producing the papers. On December 4, 1951, the Special Master filed his opinion, and on July 9, 1952, filed his findings of fact and conclusions, which on Chemie's motion were adopted by the court March 31, 1953. The Special Master found no evidence of collusion between Chemie and the Swiss Government in the matter of the seizure. He made a detailed report favorable to Chemie's conduct in the matter, including its good faith. The District Court said of this report:

> " • • • The report is well-considered and there is substantial evidence to support the findings. While it may be true plaintiff did not exercise the utmost diligence and persistence in seeking to rescind the seizure order of the Swiss Federal Attorney in respect of the Sturzenegger papers, the court finds plaintiff's efforts were those of a reasonable and prudent person in face of the obstacles confronting

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[8] See opinion of Chief Judge Laws, *Societe Internationale, Etc.* v. *McGrath*, 11 F.R.D. 294 (D.C. D.C.).

> it. The court will overrule the Government's exceptions and adopt the Master's findings that the order of the Swiss Federal Attorney, dated June 15, 1950, confiscating the records, books, and files of the firm of H. Sturzenegger & Cie. is legally supportable under Swiss law, and that plaintiff demonstrated good faith in its efforts to secure production of the papers of H. Sturzenegger & Cie., as ordered by this court on July 5, 1949."

Societe Internationale, Etc. v. *McGranery,* 111 F. Supp. 435, 440 (D.C. D.C.).

The court also said, however, that the Special Master's report did not resolve the issue either of Chemie's motion to be relieved of production or of the Custodian's motion to dismiss Chemie's complaint.

Some additional facts should be adverted to before coming more closely to grips with the court's ultimate dismissal of the complaint. After the court ordered the Sturzenegger records to be produced Chemie made unsuccessful efforts to obtain their release by the Swiss authorities. Chemie and the Sturzenegger Bank also sent letters to some of the latter's customers seeking waivers of their secrecy rights in the records. The court by various orders extended the time for compliance into the month of October, 1953. During the intervening period waivers were obtained from a substantial number of persons and over 9,000 documents* were cleared by the Swiss Federal Attorney. The process of obtaining waivers continued until some 63,000 documents were cleared

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*This figure is taken from an affidavit filed in the District Court July 14, 1953, by one of the Swiss counsel for plaintiff, in support of an annexed motion for further extension of time. In the affidavit counsel stated that at the time of his departure from Switzerland in July, 1953, the Swiss Federal Attorney "had cleared over 9,000 documents, subject, however, to their being photostated."

and released for inspection and were tendered[1] to the Custodian for that purpose on October 15, 1953. In an affidavit filed a few days later Chemie's counsel stated that of the 124 waivers and consents he had solicited, 91 consents had been received, though 17 of them did not appear primarily to involve Sturzenegger papers. A few persons had refused to waive, a few others were dead or did not respond, or were liquidated corporations whose successors could not be located. As to 3 there was evidence that there were no papers pertaining to them. No account books of H. Sturzenegger & Cie. were then tendered although Chemie advised the Custodian of a plan to be submitted to the Swiss government for photostating parts of books the entire contents of which were not cleared, with the matter declared secret blacked out.

By October 20, 1953, Chemie was unable to assure the court that full compliance would be made even if more time were granted. The court thereupon, in a memorandum dated November 16, 1953, stated its opinion that it was unlikely Chemie could make full production, as had been required by the Swiss government itself in its own earlier investigations of Chemie's ownership. By order of December 21, 1953, the court (a) granted Chemie's motion of the previous July 14th to extend to September 15, 1953, the time for production, (b) denied Chemie's

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[1] The tender was in the form of a letter to the Custodian inviting him to "begin the inspection of Sturzenegger documents" at the offices of plaintiff's counsel in Washington, D.C. The Custodian refused the offer on the grounds that the documents proffered constituted only a part of those ordered produced by the court's order of July, 1949, and that such selective and partial compliance would be rejected. It is not clear from the record what percentage of the papers ordered produced by the July, 1949, order was represented by the 63,000 documents tendered.

motion of October 15, 1953, to vacate in part the order of March 31, 1953, and to extend further the time for production, and (c) dismissed the complaint, with prejudice. This last action is the ultimate subject of our review on this appeal.

Chemie's appeal from the dismissal of its complaint leaves unaffected certain counterclaims filed by the Custodian and certain claims of intervening minority stockholders of Chemie to interests in the vested property. See Rule 54(b), *Kaufman* v. *Societe Internationale*, 343 U.S. 156, and *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A.* v. *McGrath (McGranery)*, 17 Fed. Rules Serv. § 24a.2, Case 3 (D.C. D.C.).[8]

The District Court based its dismissal of the complaint on two separate but related grounds, of which Rule 37(b)(2)[9] is more elaborately analyzed by the parties in this

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[8] The order of December 21, 1953, dismissing the complaint, with prejudice, expressly states that it "shall not apply to the claims of intervenors Kaufman, Attenhofer, and Klingler or to the claims of any other stockholders hereafter properly admitted as intervenors in this case."

In *Kaufman*, decided April 7, 1952, the Supreme Court reversed this court's decision, 88 U.S. App.D.C. 296, 188 F. 2d 1017, and held that the petitioners, who claimed to be non-enemy minority shareholders in Interhandel, were entitled to intervene as of right under Rule 24(a)(2) in the corporation's suit to recover its seized assets from the Custodian.

Subsequently, on October 23, 1952, the District Court, Pine, J., granted Attenhofer's motion for leave to intervene, which motion Kaufman had opposed. The Master's opinion on the motion had referred to the Attenhofer group as "a management-sponsored group—some of the management are members of it". See 17 Fed. Rules Serv. § 24a.2, Case 3, p. 396.

[9] The District Court pointed out, 111 F. Supp. at 446, that this rule had its parentage in Article [Section] 15 of the Judiciary Act of September 24, 1789, 1 Stat. 82, 28 U.S.C. § 636 (1946), repealed by the Judicial Code of 1948, 62 Stat. 869, 992.

court.[10] The court read this Rule in conjunction with Rule 34,[11] which provides that the court on motion may order any party to produce and permit inspection and copying or photographing of any designated documents, papers, books, accounts, etc., not privileged, "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control * * *." It is clear the papers here in question are within the scope of examination permitted by Rule 26(b), that is, that they are not privileged and are relevant to

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[10] The court also, in its order of December 21, 1953, made an express determination, pursuant to Rule 54(b), Fed. R. Civ. P., that there was "no just reason for delay in entering final judgment dismissing plaintiff's complaint". This Rule authorizes the court to enter a final judgment on one or more but less than all of the multiple claims in an action only upon making such a determination and an express direction for the entry of judgment. See *David* v. *District of Columbia*, 88 U.S. App. D.C. 92, 187 F. 2d 204.

[11] "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just." Rule 34, Fed. R. Civ. P.

the subject matter of the action. These criteria are again referred to in this opinion.

Rule 37(b)(2), which deals with the consequences of failure to comply with a Rule 34 order to produce, provides that the court may "make such orders in regard to the refusal as are just, and among others the following:"

> " • • • (iii) An order • • • dismissing the action • • •"[12]

In addition, Rule 41(b), Fed.R.Civ.P., provides that

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

In determining whether a dismissal is just under Rule 37 for non-compliance with an order to produce under Rule 34, the provisions of Rule 37 dealing specially with that problem, not Rule 41, should govern. No contrary view was expressed by the court below. Nevertheless, Rule 41 does add its influence in any consideration of the power of the District Court to dismiss a complaint otherwise than by reason of Rule 37.

Confining the discussion for the time being to Rule 37, read with Rule 34, we accept the express conclusions of Chief Judge Laws, unless a different finding is required by the action of the Swiss government, that the papers of H. Sturzenegger & Cie. are in the possession, custody or control of Chemie, see 111 F. Supp. at 442, and the basic finding implicit in his opinion that they are also within the scope of examination permitted by Rule 26(b) and not

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[12] Subparagraph (iii) reads in full as follows:

"(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"

privileged.[13] Chemie vigorously contests the conclusions of the District Court as to possession, custody or control; but we accept them. They are set forth clearly and with sufficient fullness in the opinion of Chief Judge Laws of February 19, 1953, 111 F. Supp. 435, in view of which it seems unnecessary for us to elaborate again the factual details. We will, however, discuss the effect of the laws and actions of Switzerland on these subjects. Before doing so we point out that the narration in Chief Judge Laws' opinion of the relation of Hans Sturzenegger to I. G. Chemie, his dominant position with respect to H. Sturzenegger & Cie., which is the successor to Ed. Greutert & Cie., the relation of the three companies to one another and to other companies, including, on information now available, I. G. Farben and other German interests, cannot be said by us to be erroneous. After thorough acquaintance with the case in its various stages over a period of years Chief Judge Laws said he "definitely concludes that the Sturzenegger papers were and are in the possession, custody or control of plaintiff and that except for their confiscation by the Swiss Federal Attorney, plaintiff would be able to produce them." 111 F. Supp. at 442. This finding rests upon a discussion of the evidence which traces the history of the close connection between I. G. Chemie and H. Sturzenegger & Cie. For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and, for purposes of our favorable review, find adequate support in the record. We accept also the further finding and conclusion of the District Court that the Sturzenegger papers are relevant to the issues raised by the complaint of Chemie. We do not understand Chemie to urge the contrary. A number of grounds are set forth in the opinion of the

[13] No contention is made in this court that they are privileged.

court, 111 F. Supp. at 442, as representing the Government's position with respect to relevancy, followed by the court's recognition that "banking records of the transactions of a corporation are among the best possible indicia of its ownership and control". The court there also said:

> "The records of H. Sturzenegger & Cie. are conceded by plaintiff to be relevant to the issues. Counsel for plaintiff avers he is even more interested and concerned than are defendants in their production, that they are important to him in the presentation of his proof and to meet and refute the allegations of German interest and control made by the Government."

As we have indicated, the papers in question are relevant, are not privileged, and, except for the laws and actions of the Swiss government, are in Chemie's possession, custody or control for the purposes of Rule 34. It does not follow, however, that Chemie's failure to produce them necessarily requires dismissal of its complaint with prejudice, under Rule 37(b)(2)(iii). We consider first, however, whether the action of the Swiss government, and Chemie's good faith, bar such dismissal.

As previously set forth, the Swiss Federal Attorney's order of June 15, 1950, recited that production of the papers would constitute the fact of prohibited economic espionage under Article 273 of the Swiss Penal Code and would also violate bank secrecy under Article 47 of the Swiss Bank Law, "which offense the Federal Authorities have to prevent in order to maintain the public security and order on the basis of their preventive police power". Pursuant to the order he constructively took possession of the papers, or, as we have also said, he seized or confiscated them. Chemie contends that this removed the papers from its "control" within the meaning of Rule 34, even if otherwise they were within such control. This

contention no doubt centers upon "control", rather than "possession" or "custody", because physically the papers remained in the possession or custody of Chemie, though subject to the control exercised by the Federal Attorney. Since his constructive seizure of the records was subsequent to the District Court's order requiring their production, his action bears upon the validity of the dismissal rather than upon the validity of the District Court's order when made.

Rule 37(b)(2), as we have seen, provides that when a party refuses to obey an order to produce under Rule 34 the court may make such order as is just, including one dismissing the action. See subparagraph (iii). Did Chemie refuse to obey? Or, on the contrary, has it merely been unable to obey? If the latter, does its inability, though involuntary, nevertheless constitute a refusal under the Rule? The District Court thought it did. Pointing out that Chemie had the Sturzenegger papers in its actual possession but declined to exhibit them as ordered, the court said,

> " • • • That plaintiff may have had good reason for its refusal would make the act nonetheless a refusal." (111 F. Supp. at 446)

The court then referred to the Advisory Committee Note of 1937 to Rule 37, to the effect that the provisions of the Rule authorizing judgment of dismissal for refusal to make discovery accords with *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322, which, the Note continues, distinguishes between the justifiable use of such a measure to compel production of evidence and its unjustifiable use as punishment for contempt, condemned in *Hovey* v. *Elliott,* 167 U.S. 409. *Hammond Packing Co.* v. *Arkansas* involved a refusal to produce which the Court termed a "failure by the defendant to produce what we must assume was material evidence in its possession", and which defendant had the power to produce. It followed, the

Supreme Court said, that the entry of a default judgment against defendant found its sanction,

> " • • • in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause." (212 U.S. at 350-1)

In the case at bar our concurrence in the District Court's adoption of the Special Master's report precludes consideration of whether Chemie's efforts to secure the documents were in bad faith, or of whether Chemie could have produced them without violating the Swiss secrecy laws. *Hammond Packing Co.* v. *Arkansas* accordingly seems inapplicable.

Nevertheless, we think it unnecessary to decide whether Chemie's "failure" to produce in the circumstances was such a "refusal" within the meaning of Rule 37 as warranted dismissal of its complaint with prejudice. For it is not a condition to the exercise of the power to dismiss that Chemie's inability to produce be construed as a "refusal". Specification in the Rule of remedial action available to a District Court upon a party's refusal to obey a Rule 34 order does not exhaust the court's powers. This is especially so where the action of a foreign sovereign, though a friendly one, has given rise to the problem, creating a situation hardly contemplated by the framers of Rule 37. Yet we cannot think they intended that a District Court would be powerless to solve the problem in a just manner, consistently with due process of law. We agree with Chief Judge Laws that the power to dismiss is not dependent upon the terms of Rule 37; that is to say, we think it unnecessary to find a refusal within the meaning of that Rule. As he said:

> " • • • apart from dismissal by authority of specific rule of court or statute, a court has inherent

> power to dismiss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has failed to comply with order of the court issued pursuant to its rules. See Refior v. Lansing Drop Forge Co., 6 Cir., 1942, 124 F. 2d 440, certiorari denied 1942, 316 U.S. 671, 62 S.Ct. 1047, 86 L.Ed. 1746; Note, 4 A.L.R. 2d 348. If this were not so, a court would be powerless to enforce its rules and a litigant might ignore them with abandon. • • • " (111 F. Supp. at 447)

Rule 37 apart, Rule 41(b) would permit dismissal for "failure" of the plaintiff to comply with an order of the court, thus reflecting the power thought by the Rule framers to reside in the court aside from the specific confines of Rule 37.

In the end the question turns upon whether the particular exercise of the power to dismiss with prejudice is consistent with due process of law. We advert now to factors which lead us to conclude that the power as exercised in the present case meets this constitutional test. The property of Chemie, a corporate national of Switzerland, had been vested under the Trading with the Enemy Act. See *Kaufman* v. *Societe Internationale,* 343 U.S. 156, 159. There, in referring to *Clark* v. *Uebersee Finanz-Korp.,* 332 U.S. 480, the Court said:

> " • • • We there held that the 1941 amendment [to the Trading with the Enemy Act] authorized the Custodian to seize and vest in himself all property of any foreign country or national, even that of friendly or neutral nations. At the same time we refused to hold that the 1941 amendment deprived friendly or neutral nations or nationals of a right to have their assets returned if they could prove that they were free of any open or concealed enemy taint. • • •"

These cases demonstrate that Congress intended by Section 9(a) of the Act to permit any corporation of a neutral or friendly state to recover property vested under Section 5(b) if "not an enemy or ally of enemy" or, as

said in *Kaufman* v. *Societe Internationale, supra* at 159, "if they could prove that they were free of any open or concealed enemy taint." Chemie having filed its action under Section 9(a) to recover property vested under Section 5(b) the principal issue on the merits is whether it was enemy tainted within the principles of *Clark* v. *Uebersee Finanz-Korp., supra.* As we have set forth, and as is more fully detailed in the opinion of Chief Judge Laws, the Sturzenegger papers are material on this issue. They were ordered produced. If the Swiss authorities had not then intervened, and if Chemie had wilfully refused to comply with the order, dismissal of its complaint with prejudice, based on such refusal, would not have been an unconstitutional deprivation of property, *Hammond Packing Co.* v. *Arkansas, supra* at 351. Except for the action of the Swiss Federal Attorney, explicitly designed to prevent their production in this case,[14] the documents could have been produced. For the District Court to hear and decide the case without them might give plaintiff a decisive advantage, leading to recovery of extremely valuable property notwithstanding, were the papers produced, Chemie might be shown to be enemy tainted, in

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[14] This is illustrated by an order of the Swiss Federal Attorney of June 25, 1951, denying Chemie's request to countermand the seizure order and permit Sturzenegger to produce its books and records. In denying the request, the Swiss authority stated: "The said order [seizing constructively the books and records] applies exclusively to the firm Sturzenegger & Co. * * * and against the order of the American court in respect of this banking firm for the production of its business records to the United States District Court * * *." "The fact that the American authorities wish to inspect the records * * * is exactly what gave rise at that time to the issue of the order * * *." The order itself had expressly described the documents thereby confiscated as "the business records or books of the banking firm * * * ordered to be produced by the American judge".

which case the property would be withheld by the United States under existing legislation. True, there is no certainty about this. Uncertainty as to the part the undisclosed papers would play creates the difficulty. But, in view of the findings of the District Court, we think due process of law does not require the Custodian to sustain with certainty prior to trial the proposition that the undisclosed papers would defeat Chemie, or the proposition that Chemie's claim can be defeated without them. Where, as here, adequate basis underlies the District Court's findings of relevancy and materiality, and of possession, custody or control, except for the Swiss Federal Attorney's order, so that the indicated relationship between Chemie and H. Sturzenegger & Cie. leads reasonably to the conclusion that the records are important in resolving the issue of Chemie's enemy taint, due process of law is not violated by requiring their production as a condition to trial. In other words it is not fundamentally unfair or arbitrary to require Chemie to comply with an order that is designed, in accepted legal fashion, to elicit the truth or, failing compliance, to dismiss its action, when the requirement is shown to have a very real relationship to the means of arriving at the truth of the substantive issues in the litigation.

Due process in the circumstances of the case does not insist that Chemie be allowed to go to trial in a manner inconsistent with accepted procedures, now embodied in the Rules but which long antedate them in development. Handicap in the conduct, and risk in the outcome, of litigation, due to the absence of evidence reasonably determined on the basis of available information to be relevant and material, need not be cast upon a defendant when a plaintiff by action of its own government is disabled from complying with discovery rules applicable generally to litigants under the law of the forum. Switzerland in her own wisdom, upon con-

sideration no doubt of many factors, has rendered her national, Chemie, unable to comply with a valid order of the trial court in an important matter respecting the evidence. The order itself is not inconsistent with due process of law. *Consolidated Rendering Co.* v. *Vermont,* 207 U.S. 541. To require compliance as a condition to Chemie's further prosecution of its claim is to insist that if the trial is to go forward it shall do so in accordance with accepted procedures for developing the truth about contested factual issues raised by Chemie, the ultimate objective of the trial. This too is not a denial of due process of law, since, to borrow the test applied to legislation, "the means selected * * * have a real and substantial relation to the object sought to be attained." *Nebbia* v. *New York,* 291 U.S. 502, 525, 537.[18] *Lapides* v. *Clark,* 85 U.S. App. D.C. 101, 102, 176 F. 2d 619, 620, *cert. denied,* 338 U.S. 860. See, also, *Minder* v. *Georgia,* 183 U.S. 559, 562; *Davidson* v. *New Orleans,* 96 U.S. 97, 107-8, separate opinion of Mr. Justice Bradley; *Missouri Pacific Railway Co.* v. *Humes,* 115 U.S. 512, 519, 520; *Ballard* v. *Hunter,* 204 U.S. 241, 255; *Endicott Co.* v. *Encyclopedia Press,* 266 U.S. 285, 288; *Steward Machine Co.* v. *Davis,*

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[18] In *Hagar* v. *Reclamation District No. 108,* 111 U.S. 701, 708, the Supreme Court said:

> " * * * It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause * * * means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. * * *"

301 U.S. 548, 584-5; *Carolene Products Co.* v. *United States,* 323 U.S. 18, 31-2.

It will be seen from the foregoing discussion that our view, like that of the court below, does not lean heavily upon the theory of a factual presumption adverse to the one who fails to produce the papers ordered, as in *Hammond Packing Co.* v. *Arkansas, supra,* nor upon the theory of punishment, discredited in *Hovey* v. *Elliott, supra.* Though there may be some element of adverse factual presumption, we rely chiefly on the necessity for discovery as an aid in the development of facts. This is particularly important in such a case as this, where the intricacies of relationships are so difficult to unfold and their geographical locale is centered so close to the former enemy, and where the secrecy laws which Switzerland deems wise prevent discovery which on adequate showing is deemed material to the case.

What we have here said is fortified by established legal principles. It is settled that "the fullest possible knowledge of the issues and facts before trial" is intended by the rules governing discovery. *Hickman* v. *Taylor,* 329 U.S. 495, 501. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Ibid.,* p. 507. In *Dixon* v. *Ramsey,* 7 U.S. (3 Cr.) 319, 324, involving the authority of an executor appointed in a foreign country to sue in the courts of this country, Chief Justice Marshall said: "No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country." "[S]ubstantive matters are governed by the foreign law, and * procedural matters, or, as it is more usually expressed, matters relating to the remedy are governed by the law of the forum." 3 Beale, Conflict of Laws (1935) 1600. *Don* v. *Lippman,* 5 Cl. & Fin. 1, 7 Eng. Rep. 303, 307 (H.L. 1837). In a footnote to the opinion of the Court in *Guaranty Trust Co.* v.

United States, 304 U.S. 126, at 134, it is said that a foreign sovereign suing as a plaintiff must give discovery, citing *Rothschild* v. *Queen of Portugal*, 3 Y. & C. Ex. 594, 596; *United States* v. *Wagner*, L. R. 2 Ch. App. 582, 592, 595; *Prioleau* v. *United States*, L. R. 2 Eq. 659. See, also, *King of Spain* v. *Hullett*, 7 Bligh N.S. 359, 392-3 (H.L. 1833). A foreign national is in no better position.

The *Prize Cases*, now to be considered, are also enlightening as to the force which the courts have recognized as residing in rules or court orders requiring discovery. Discovery has been insisted upon notwithstanding it was forbidden by the law of the sovereign of the claimant; and failure on his part to make discovery has at times resulted in dismissal of his claim.

In *The Consul Corfitzon* [1917] App. Cas. 550, Swedish claimants to cargo seized on the high seas appealed from an order of the Admiralty Division requiring them to produce certain books of account and other documents. They had declined on the grounds they might become liable to penalties under Swedish law. In affirming the discovery order the Privy Council stated that "a Court of Prize cannot properly be deterred from making • • • the appropriate order because a neutral claimant would, if he obeyed the order, be guilty of a breach of his own municipal law", *ibid.*, p. 555, adding that the "practice and procedure [of the forum] are governed by the municipal law of the State from which it derives its jurisdiction".

In *Steamship "Antilla" and Other Vessels*, 7 Lloyd's Prize Cases 401, broad discovery orders of the *Consul Corfitzon* variety had been made relating to claimants' business books, but had been complied with only partially. Claimants, being unable to promise full compliance, requested permission to try the case on the evidence available. The court denied the request and struck the claims, stating:

> " • • • that when orders are made by this Court, and are not appealed from, they must be taken to be

> valid orders, and they must be obeyed. If they are not obeyed, those claimants upon whom they are made will be in contempt and their claims will be liable to be struck out. * * *" (*Ibid.*, p. 405)

The Baron Stjernblad [1918] App. Cas. 173, 178, reiterated the Prize Court's policy of refusing "to accept the dictates of any municipal law as to what discovery ought or ought not to be insisted on either generally or in any particular case." The Privy Council recognized the foreign claimant was put in the anomalous position of either losing his case or incurring penalties in his own country, but pointed out that "the anomaly is certainly not due to any defect in the practice of the Prize Court or in the law which it administers." *Ibid.*, p. 179.

There is a reference to *Kronprinsessan Margareta* in 6 Lloyd's Prize Cases 105 n. The Privy Council is said to have denied leave to appeal from the dismissal of a claim when the Swedish claimant declined to answer some of the interrogatories administered to it on the court's authorization because permission to answer had been requested and denied by the Swedish government. It was said this refusal made no difference in the Prize Court.

In *The Kronprinzessin Victoria* [1919] App. Cas. 261, a trial had taken place, at which the claimants declined to produce their books in court because of Swedish laws. Holding that the court properly refused to let the Swedish secrecy law affect its weighing of the evidence in deciding against claimants the Privy Council pointed out, at p. 267, that "if the evidence by which their case might have been cogently supported was required for their other business in Sweden, it was for them to choose whether they would conduct their case or their business to the better advantage."

In Re Von Kantzow's Patent [1944] Ch. 318, 321, was a non-prize case where applicants sought extension of certain British patent rights in order to recoup revenue losses allegedly suffered during the war. Due to Swedish

secrecy laws they were unable to furnish evidence that they had not made countervailing profits abroad during the war. Consistently with the prize-case principle of maintaining discovery orders over contrary foreign law, the court said:

> "• • • It appears to me that this court, having placed on it the delicate task of determining whether its discretionary jurisdiction should be exercised in favour of an applicant in a matter in which the public interest also is concerned, must be told all the relevant facts. If an applicant is the subject of a foreign State and is precluded by his municipal law from giving the necessary information to the court, that is his misfortune."

Chemie might have some remedy at the hands of its own government for any loss it can place at her door, but this of course is beyond our help. We merely note that when Switzerland takes action of the character here involved, which she deems beneficial to herself and her nationals as a whole, the disadvantage caused a particular national in litigation abroad is fairly left where the law of the forum places it.

We have considered an alternative solution; that is, to permit the case to go to trial without the unproduced papers, as was requested and denied in *Steamship "Antilla" and Other Vessels, supra,* with possible action, because of failure to produce, to await eventualities. If Chemie were unable to show the absence of enemy taint, or failed in other respects to prove its case, judgment would be rendered for the Custodian on the merits. And if Chemie did make out its case but in the court's view the unproduced documents might if available lead to a different result, the court could then dismiss if the failure to produce persisted. But we think the District Court was not required to adopt this alternative. Since dismissal was within its powers we should not without strong reasons disapprove the manner in which it exercised con-

trol over litigation of which it bears the heaviest burden. Years have been consumed in preliminaries and in efforts to obtain full discovery as ordered. The District Court has become thoroughly acquainted with the factors which led to its decision. We cannot say it has abused its discretion or acted unjustly, or that its failure to adopt some other possible course constitutes reversible error. We add in this connection that not only production, but production before trial, is important; for the Custodian should have the benefit of discovery for cross-examination and preparation.[16] Moreover, the alternative suggested, with no definite conclusion in sight, would be a very unsatisfactory way of proceeding with a long trial.

One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered.[17] This will afford another opportunity to bring the case on for a trial and decision on the merits.

Affirmed with modification.

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[16] This would be so even were the court to refer the matter to a Special Master in order to save some of its own time.

[17] We speak of discovery in general terms, since there is no reason to think that the District Court will require actual production in the United States if other arrangements, such as for inspection or copying in Switzerland, can reasonably be made.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 500

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A. (I. G. CHEMIE), ETC., PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND IVY BAKER PRIEST, TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The principal opinion of the district court (J. A. 605–628),[1] issued February 19, 1953, is reported

[1] Citations to the record will be in accordance with the method adopted by petitioner (Pet. 2, n. 2). "J. A." refers to the printed Joint Appendix which is in four volumes consecutively paginated (1–1918). The proceedings in the court of appeals as certified to this Court carry numbers 1919–1960 and will be cited "R. ——." References to the record before

at 111 F. Supp. 435. A supplemental memorandum (J. A. 672), dated November 16, 1953, is reported at 15 F. R. D. 83. The opinion of the court of appeals is reported at 225 F. 2d 532.

JURISDICTION

The judgment of the court of appeals was entered June 30, 1955. R. 1941. A petition for rehearing *en banc* was denied September 1, 1955. R. 1959. The petition for a writ of certiorari was filed October 31, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner, a company organized under Swiss law, brought suit against respondents in 1948 to recover property vested under the Trading with the Enemy Act. In subsequent discovery proceedings, the district court, in 1949, ordered full production by both parties. The order of production, insofar as it related to petitioner, included a direction to produce records of a private bank (H. Sturzenegger & Cie.) which the court found to be closely affiliated with, and under the control of, petitioner. Petitioner has not complied with the direction to make full disclosure of the Sturzenegger records, on the ground that Swiss secrecy laws prevent it from doing so. The district court has dismissed the complaint for failure to comply. The court of appeals affirmed, but modified the

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the court of appeals not included in the printed Joint Appendix but also certified to this Court will be by "Record ——."

order of dismissal so as to provide an additional six months for compliance. The following questions are presented:

1. Whether the district court properly determined that the order to produce should embrace the Sturzenegger records.

2. Whether, in this proceeding brought in the United States District Court, Swiss law may serve to exonerate petitioner from the duty to comply with the court's order to produce.

3. Whether the remedy of dismissal is appropriate.

STATUTE AND RULES INVOLVED

The pertinent portions of the Trading With the Enemy Act and of the Federal Rules of Civil Procedure are set out in Appendix A, *infra*, pp. 36–42.

STATEMENT

History of the proceedings.—In October 1948, petitioner, Societe Internationale pour Participations Industrielles et Commerciales S. A. (hereinafter sometimes referred to as "I. G. Chemie"), brought suit against respondents in the United States District Court for the District of Columbia seeking the return of property vested under the Trading With the Enemy Act. The complaint alleged that petitioner is the owner of described vested property, consisting of some 93% of the stock of General Aniline & Film Corporation, a Delaware corporation, and that it is not an enemy. J. A. 148. The answer (J. A. 358–394) denied

both allegations and, as a separate defense, alleged that since its incorporation in 1928 to the surrender of Germany in 1945 petitioner had participated in a conspiracy with the private bank of H. Sturzenegger & Cie. (formerly known as Ed. Greutert & Cie.), with I. G. Farbenindustrie of Germany and others to cloak the ownership, control, and domination by I. G. Farben of properties in the United States and many other countries. J. A. 371–372.

In January 1949, both parties moved for the production of documents under Rule 34. The Government's motion, which sought production of petitioner's records and the records of its affiliated private bank, H. Sturzenegger & Cie., was supported by an affidavit and three attached exhibits. The latter were reports made by the Swiss Compensation Office, an agency of the Swiss Government, which had investigated petitioner in 1945 and 1946 under Swiss laws pertaining to German assets. J. A. 196–324.

After full argument (J. A. 27–42), Chief Judge Laws, on July 5, 1949, entered an order for reciprocal production of documents. J. A. 339–342. In an accompanying opinion (J. A. 335–338), the court referred to the Government's claim that petitioner was enemy-owned, controlled, and tainted, and that it had sought to conceal the true facts of its ownership and control by the use of subsidiaries in various parts of the world. "In such a case," Judge Laws stated, "every record of

plaintiff, as well as of its subsidiaries and affiliates, may have a tendency to prove or disprove such claims of defendants." J. A. 337. Petitioner was accordingly directed to produce, in Switzerland, for inspection and copying, its own records and those of H. Sturzenegger & Cie., which was found by the court to be closely affiliated with, and under the control of, petitioner. In this connection, the court took note (J. A. 340) that the discovery which it was authorizing followed the path taken by the Swiss Compensation Office in its investigations of 1945 and 1946. See J. A. 234, 254–258, 773–775, 804–812.

The proceedings on the cross-motions for production in Febuary 1949 interrupted the deposition of Hans Sturzenegger, which was then being taken by the Government. J. A. 335–336.[2] By the court's order of July 5, 1949, the Government was required to make full disclosure of its documents before proceeding with the deposition of Mr. Sturzenegger. After completion of the deposition, petitioner was to produce. J. A. 339–341. In August and September 1949, the Government fully complied with the court's order and

[2] Previously, in January 1949, petitioner had been required, by order of Judge Laws, to produce Mr. Sturzenegger from Switzerland for the taking of his deposition. J. A. 195. Sturzenegger's personal role in the case is a dual one. He is (1) a director of petitioner (in which capacity he was summoned as a deponent), and (2) the sole unlimited partner in, and the manager of, H. Sturzenegger & Cie. J. A. 193–194, 762, 178, 756–757.

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produced the papers collected by the Government. J. A. 607. When, upon resumption of his deposition, Mr. Sturzenegger stated that he did not intend to permit production of the Sturzenegger records (J. A. 951–953), the Government moved that the production take place in the United States rather than in Switzerland as originally ordered. J. A. 357. Petitioner cross-moved to amend the discovery order by eliminating the Sturzenegger records from those ordered produced, contending, *inter alia,* that their disclosure would violate Swiss penal laws governing bank secrecy and economic espionage. J. A. 395–396, 405–412. On April 21, 1950, Judge Laws denied both motions after a hearing. J. A. 73–75, 412–413.

Shortly before the time set for petitioner's production, the Swiss Federal Attorney, on June 15, 1950, issued an order forbidding H. Sturzenegger & Cie. to produce its records. Without directing that they be taken into possession, the order recited that they are "herewith confiscated." The stated purpose of the order was to prevent production of the records as ordered by the district court because inspection would violate Swiss laws relating to bank secrecy and economic espionage. J. A. 719–720, 608. Petitioner thereupon moved again that it be excused from the obligation to produce the Sturzenegger records (J. A. 415), and the Government renewed its motion that the records be ordered produced in the United States. J. A. 413–414. After a hearing, Judge Laws de-

nied both motions without prejudice and stated that the order for discovery would stand. J. A. 75–79, 608–609.

During the ensuing inspection in Switzerland in July and August of 1950, petitioner failed to produce the Sturzenegger records. The Government thereupon moved to dismiss for failure to produce. Before passing on the motion, the district court specially referred to a Master the following questions: petitioner's good faith in seeking to comply with the court's discovery order; the nature of the Swiss secrecy law; and the finality of the Swiss order under Swiss law. J. A. 608–609, 452–459. The Master found that production of the Sturzenegger records would have violated Swiss laws and that petitioner and Sturzenegger had been in good faith. J. A. 536–543, 522, 531. He rejected, as evidence of bad faith, the fact that neither petitioner nor Sturzenegger had sought releases ("waivers") from the persons whose secrets were contained in the Sturzenegger records (J. A. 505, 507–508, 537–542, 546–547). He also found that H. Sturzenegger & Cie. could have appealed from the order of the Swiss Federal Attorney, but that Sturzenegger had acted in good faith in deciding not to do so. J. A. 528.

The decision of the district court to dismiss.— In November 1952, Judge Laws thoroughly reviewed the matter in a hearing extending over five days. J. A. 84–108; Record 923–1340. In his opinion of February 19, 1953, he concluded that,

unless full disclosure was made within a specified time (June 15, 1953), the complaint should be dismissed with prejudice. J. A. 626–628, 632–634. The court noted that, while there had been a production of "large quantities, although apparently not all,[3] of the documents" of petitioner, none of the papers of H. Sturzenegger & Cie. had been produced. J. A. 608–609. It adopted the conclusions of the Master's report, noting, however, that "it may be true plaintiff [petitioner] did not exercise the utmost diligence and persistence in seeking to rescind the seizure order of the Swiss Federal Attorney in respect of the Sturzenegger papers." J. A. 610–611.

The court fully re-examined the facts bearing on the affiliation of the Sturzenegger bank and petitioner. J. A. 611–615. It noted that Mr. Sturzenegger, as the only unlimited partner of the Sturzenegger bank and as officer or managing agent of petitioner,[4] is the dominant personality

[3] This has reference to proceedings in 1952 in which the Government established, through analysis of a numbering system applied by the Swiss Compensation Office to petitioner's papers, that at least some 9,000 papers of petitioner had been suppressed. Some 5,000 thereof, now "found" in its files, were thereupon produced by petitioner. J. A. 550–553, 79–84, 108–109, 597, 603–604. The Government had also shown in 1952 that the books produced by petitioner were a rewritten set, many of them having been purchased after the time as of which they purported to record daily transactions. J. A. 572–596.

[4] It was because of Mr. Sturzenegger's position as "officer or managing agent" of petitioner within the meaning of Rule 37 (d) that petitioner had been required to produce him from Switzerland. J. A. 193–194.

in his own company and, perhaps, in both companies. It found that until 1943 petitioner had a 44% partnership interest in the bank and that there is in existence, by means of options, pledges, and loans, a tight chain of control linking petitioner and the Sturzenegger bank. J. A. 611–612. The fact that in its investigation of the German character of petitioner the Swiss Compensation Office had examined all business transactions of the Sturzenegger bank is further evidence, the court stated, that "an investigation of I. G. Chemie is necessarily an investigation of H. Sturzenegger & Cie." J. A. 613. The court found additionally that petitioner had been established by I. G. Farben of Germany through the Greutert firm (Sturzenegger's predecessor); that petitioner's investments were managed by the Sturzenegger bank; that the two firms are in close proximity; that the majority of petitioner's stock could always be controlled by the Sturzenegger bank; that the partnership agreement of the bank supports the finding that petitioner controls the bank; and that petitioner's liquidation, in August 1949, of its investment in the Sturzenegger bank was not a deciding factor on the question of control because by that time the discovery motions were under consideration by the court. J. A. 613–614. The court found that "through the interlocked web of corporate organization, management and finance there runs the thread of fundamental identity of individuals

in the pattern of control." J. A. 615. It concluded that the Sturzenegger papers were and are in the possession, custody, or control of petitioner and that, except for their confiscation by the Swiss Federal Attorney, petitioner would be able to produce them. J. A. 615.

The court referred to the Government's showing that only the Sturzenegger papers would disclose such essential information as the control of petitioner; the identity of its stockholders; the ownership and activities of its dominant stockholder; the nature of the companies controlled by it; and the ownership, investment, and management of its assets. It concluded accordingly that full production of the Sturzenegger records was essential. "The lack of availability of the Sturzenegger papers for inspection for use as possible evidence in this case well might prove to be a deciding factor in the outcome of this suit." J. A. 617.

The court then decided "the basic question of what action should be taken in a case in which a foreign government prohibits its national, a party-plaintiff, from performing its duty to make discovery as ordered pursuant to Rules of the Court." J. A. 618. It concluded that petitioner's failure to comply with essential procedures for the administration of justice required dismissal of its complaint, and that dismissal was authorized by Rule 37 of the Federal Rules of Civil

Procedure and was, in any event, within the inherent powers of the court. J. A. 622–625. Such dismissal, it stated, is "not by way of punishment for contempt or for contumacy" but "rather by way of denying the right of a plaintiff to proceed without obeying established Court procedures." J. A. 623. The law of the forum, it reasoned, must govern; otherwise, the foreign government might release only those records favorable to its national and thereby frustrate the local law, expressed in the Trading With the Enemy Act. J. A. 619–620. If that were permitted, respondents would be deprived of due process. J. A. 625–626.

While ruling that the complaint was subject to dismissal, the court nonetheless granted petitioner further opportunity to comply. Dismissal was suspended until June 15, 1953. J. A. 633.

Proceedings following the district court's decision.—Petitioner obtained an extension until July 15, 1953, on the ground that it had appealed to the Swiss Federal Council, the supreme authority in Switzerland, for permission to comply. J. A. 655, 652–655. Petitioner also stated that it had begun to solicit waivers from the persons whose secrets were contained in the Sturzenegger records (J. A. 635–639), a procedure approved two years earlier by the Swiss Federal Attorney under which he had agreed to release individual documents "proved to be indispensable for the

suit" if waivers were obtained from the persons concerned. J. A. 544, 543–545. The Swiss Federal Attorney had, however, expressly reserved "the right to refuse to release individual documents without stating grounds for this." J. A. 544.

On June 30, 1953, the Swiss Federal Council denied petitioner's request for an order that it and the Sturzenegger firm be permitted to comply with the court's order. J. A. 661, 660–663. Petitioner nevertheless moved for another extension until September 15, 1953, on the ground that it was continuing its efforts to secure individual waivers. J. A. 656–660. On October 15, 1953, a few days before its motion was to be heard, petitioner invited the Government to "begin the inspection of Sturzenegger documents." J. A. 666–667. It also moved for an additional extension for an unspecified period, on the grounds that 63,658 Sturzenegger documents had been released [5] (by the method of waivers and clearances from the Swiss Federal Attorney) and that others would

[5] It is not clear how large a percentage of the papers of the Sturzenegger bank was represented by these 63,658. The court had ordered production of the "some 700 jackets and 140 account books on the premises of I. G. Chemie and H. Sturzenegger * * * examined by investigators of the Swiss Compensation Office" (J. A. 340), *i. e.*, about 250 Chemie jackets and Sturzenegger's "dossiers about * * * 450 * * * containing files about 55,500." J. A. 234–235. The latter figure is uninformative because, as Sturzenegger explained, a "file" in a "dossier" may contain two or three papers clipped together. J. A. 806.

be submitted.[6] J. A. 663–665. At the subsequent hearing of October 20, 1953, petitioner indicated that it would not make full disclosure of the Sturzenegger books of account. It stated merely that it was considering the submission to the Swiss Government of a plan for photostating excerpts from the books in instances where the entire contents were not covered by waivers. J. A. 668–670, 118–119, 137–138. In response to inquiries from the court, counsel for petitioner stated that he could give no assurance that full compliance would be made, even if still further extensions of time were granted. J. A. 112–122, 126–132, 144–145.

In a memorandum opinion dated November 16, 1953, the district court found that despite four years of elapsed time there was still no reasonable likelihood that petitioner could make full production of the documents such as had been required by the Government of Switzerland in its

[6] It does not appear that waivers were solicited from all customers of the bank. Rather, letters were sent to 124 individuals and companies named two years earlier by the Government, in proceedings before the Master, as persons affiliated with petitioner and Sturzenegger, from whom petitioner could easily have solicited waivers. J. A. 112–113, 637–639, 720, 657–660. In response, 91 waivers had been received; two persons had refused to give a waiver; two had not responded; four were dead or liquidated corporations and successors could not be located. Moreover, some papers as to which waivers had been made could not be produced, because the Swiss Federal Attorney refused to clear them without waivers of other persons "mentioned or involved therein." J. A. 671–672, 117.

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prior investigations of similar issues. The court therefore dismissed the complaint with prejudice. J. A. 672–673. The court's order (J. A. 679–680), entered December 21, 1953, is in terms inapplicable to the claims of minority stockholders in petitioner who intervened in the case alleging interests in the vested property. J. A. 680. See *Kaufman* v. *Societe Internationale,* 343 U. S. 156.

The decision of the court of appeals.—The unanimous opinion of the court of appeals affirmed the order of dismissal, holding that the findings were those of a district judge intimately familiar with the case and that they were supported by the record (R 1928). "* * * the narration in Chief Judge Laws' opinion of the relation of Hans Sturzenegger to I. G. Chemie, his dominant position with respect to H. Sturzenegger & Cie., which is the successor to Ed. Greutert & Cie., the relation of the three companies to one another and to other companies, including, on information now available, I. G. Farben and other German interests, cannot be said by us to be erroneous." *Ibid.*

The court found it unnecessary to decide whether petitioner's failure to produce amounted to a "refusal" within the meaning of Rule 37.[7]

[7] "Specification in the Rule [37 (b) (2)] of remedial action available to a District Court upon a party's refusal to obey a Rule 34 order does not exhaust the court's powers. This is especially so where the action of a foreign sovereign, though

Observing that suppression of the papers in question might give petitioner a decisive advantage and that the litigation risk arising from non-production "need not be cast upon a defendant when a plaintiff by action of its own government is disabled from complying with discovery rules applicable generally to litigants under the law of the forum" (R. 1934), the court held that it is within the power of the federal judiciary and entirely consistent with due process to "insist that if the trial is to go forward it shall do so in accordance with accepted procedures." (R. 1935).

The court of appeals, however, modified the order of dismissal by providing that it shall not become effective until six months after the mandate is received by the district court, and not then if within that period full production is made. R. 1940. A petition for rehearing *en banc* was denied by order of September 1, 1955. R. 1959. Issuance of the mandate was stayed until November 1, 1955. R. 1960.[8]

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a friendly one, has given rise to the problem, creating a situation hardly contemplated by the framers of Rule 37." R. 1931.

[8] We do not suggest in the Argument which follows that the case is not ripe for consideration by this Court because of the inclusion of the proviso by the court of appeals. It appears that the issues decided are fundamental to the further conduct of the case and that, consistently with the practice of the Court, the petition may properly be considered on its merits. See *United States* v. *General Motors Corp.*, 323 U. S. 373, 377.

ARGUMENT

1. The dismissal of the complaint was predicated upon petitioner's failure to comply with the district court's order of July 5, 1949, ordering the production of the Sturzenegger records. Petitioner has frequently conceded the relevancy of those records. J. A. 615; Record 1165–1166, 1042, 163–164. However, its petition attacks the determination that the records were in the control of petitioner, asserting that the procedure followed by the district court in making that determination was so irregular as to call for an exercise of this Court's supervisory jurisdiction. Pet. 10–11, 17–23.

Petitioner charges, *inter alia,* that it was irregular to proceed in this matter without oral testimony, and that the record is infected by hearsay, innuendo, *ex parte* statements, remarks of counsel, and references to non-record material. Pet. 10, 17. But, although petitioner filed nine briefs in the district court on the issue of control, and although the court held ten days of hearings on that issue (in February and April 1949, April and June 1950, January 1951, and November 1952), petitioner never objected to the procedure followed. Petitioner contended only that the facts would not support a finding of control. On this issue, it requested, at the time the district court ordered dismissal of the complaint, that the court make separate findings of fact. J. A. 675.

Due process does not require that a hearing on the preliminary issue whether there is "good cause" to issue an order of production be conducted as if it were a trial. Petitioner had not one but repeated opportunities to be heard. Certainly, it is in no position to complain at this juncture that it was not heard through the testimony of witnesses when it never once suggested to the district court, in the entire protracted course of the proceedings, that it wished to produce a witness.

As set forth in the Statement (*supra,* pp. 4–10; see also, *infra,* p. 20, n. 14), the district Court had before it affidavits and exhibits thereto, admissions of Sturzenegger (petitioner's ~~office~~ agent) appearing in his deposition,[9] and admissions of petitioner's counsel.[10] Petitioner challenges the reports of the Swiss Compensation Office, received as exhibits, on the ground that they could not be taken as proper proof of any matter stated therein. Petitioner, it is to be noted at the outset, did not object to the receipt of these exhibits, but offered to bring them before the district court by stipulation. J. A. 26–27. Petitioner's counsel

[9] Petitioner itself relied on the Sturzenegger deposition in the course of the proceedings below. Thus, its brief in the court of appeals (pp. 23–26, 54–56) made extensive references to the Sturzenegger deposition.

[10] There is also a history of petitioner's ability to draw upon the Sturzenegger files for its own purposes. See *infra,* pp. 24–25.

has relied on portions of the reports throughout the proceedings,[11] and petitioner's officer, Sturzenegger, has confirmed substantial portions of the reports in his deposition testimony. See, *e. g.*, J. A. 792–793, 866, 963, 1143–1161, 1170, 1233–1292, 1301–1310. From the standpoint of the reliability of factual statements in these reports, we point out that they are official reports of an agency in the executive branch of the Swiss Government and that they consist largely of descriptions of facts taken from petitioner's and the Sturzenegger Company's books and records. They are particularly persuasive in showing that the Swiss authorities found it necessary, in order to investigate petitioner, to make a full examination of the Sturzenegger records. It is, indeed, rare that a court can obtain such a degree of insight into the preliminary question whether it should order discovery.

Petitioner protests (Pet. 10) that, in the proceedings before the district judge, references were made to certain documents not on file in the case. The facts are these. Government counsel referred to several documents which petitioner had in its possession and had produced for inspection by the Government. Petitioner did not question the correctness of the Government's statements as to the contents of these papers but offered cer-

[11] Petitioner's brief in the court of appeals contained numerous references to these reports and quoted from them at length.

tain explanations by way of confession and avoidance. J. A. 553–554, 86–87, 683–684, 98–99, 102–106. Petitioner, of course, had it fully within its power to offer the documents if it felt that they had been misrepresented. There was no practical necessity for the Government's introducing them in light of the concessions of petitioner's counsel.

Petitioner also claims that the district court did not make adequate findings on the issue of control. Passing the question whether findings are required in proceedings of this character,[12] we point out that the district court made detailed findings in its opinion of February 19, 1953 (J. A. 611–615), in addition to the findings made in its earlier opinions of June 23, 1949 (J. A. 337–338), and February 15, 1951. J. A. 453.[13] Findings may appear in an opinion. Rule 52 (a). *McGranery* v. *Vort*, 199 F. 2d 782 (C. A. D. C.), affirming

[12] Contrary to petitioner's contention (Pet. 20–21, n. 13), the penultimate sentence of Rule 41 (b), added by the amendment of 1946, does not impose such a requirement. As shown by the context and by the Committee's Note, findings are required by that rule when the court, sitting as trier of the facts, renders judgment after a trial on the merits. Note to Rule 41, 28 U. S. C. (1952 ed.), following Section 2072.

[13] The district court was not, as petitioner contends (Pet. 19–20), of the view that it had made no findings in its opinions. The court's memorandum of December 21, 1953 (J. A. 677–678) did not deal with the issue of control. When petitioner's counsel on December 17, 1953, urged Chief Judge Laws to make findings on control, the court responded:

"The COURT. I remember that. I think I made a lot of findings on that, as I remember it, in the first opinion [opinion of February 19, 1953] * * *." Record 1514.

Vort v. *McGrath*, 99 F. Supp. 57, certiorari denied, 345 U. S. 911.

Complaint is also made that the transcript of record before the court of appeals was improper because it included certain unverified exhibits to the Sturzenegger deposition. It is said (Pet. 18) that these documents may have had some effect upon the court of appeals when it accepted, as supported in part by "information now available," the district court's finding that petitioner and Sturzenegger had some relations to "I. G. Farben and other German interests." R. 1928. But this statement by the court of appeals was simply a broad reference to the fact that much supplemental information had become available to the district court after it made its initial finding of control in 1949. In any event, petitioner did not move in the courts below to exclude the Sturzenegger exhibits from the transcript of record. Indeed, petitioner, not the Government, designated the Sturzenegger deposition and its exhibits as part of the record to be transmitted to the court of appeals. R. 3282–3283, set forth in Appendix B, *infra*, pp. 43–44. Moreover, the finding as to the relations of petitioner and Sturzenegger with I. G. Farben and other German interests is fully supported by evidence of record entirely apart from any of the Sturzenegger exhibits.[14]

[14] *E. g.*, J. A. 864–866, 958–959, 962–963, 980, 1010–1014, 1078–1082, 1105–1121, 1129–1137, 1143–1149, 1173–1181, 1186–

The adequacy of the determination which led to the promulgation of the discovery order has been fully considered by the court of appeals. While we have addressed ourselves to petitioner's objections, we believe that, so far as this issue is concerned, there is no reason for departure from the ordinary two-court rule.[15]

2. The basic question, from the standpoint of the duty to comply with the district court's order of production, is whether Swiss law may be regarded, in this proceeding brought in the Ameri-

1198 (admissions by Sturzenegger), J. A. 88–93, 97–101 (admissions by petitioner's counsel), J. A. 211–220, 239–251, 295–296, 308–317 (statements by the Swiss Compensation Office).

The same is true with respect to all findings of the district court showing petitioner's control. For example, there is in the record evidence showing a chain, the so-called Greutert/Sturzenegger/Chemie Complex, linking by intricate circular connections the Sturzenegger firm with four privately and closely held holding companies. J. A. 1564, 175, 880–886. Petitioner owned 44% of the Sturzenegger firm, and the Complex in turn owned a controlling interest in petitioner. J. A. 881–886. The district court's finding that there was a tight chain of control linking petitioner and the Sturzenegger bank (J. A. 612) is supported by admissions of Mr. Sturzenegger (J. A. 1564, 175, 880–886, 1238–1250, 1262–1274, 1284–1307), by statements of the Swiss Compensation Office (J. A. 221–222, 224–226, 247, 260, 281–290), and by admissions of counsel. J. A. 90, 96; Record 1152–1155.

[15] See *Comstock* v. *Group of Institutional Investors*, 335 U. S. 211, 214; *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275. The rule applies to cases where review is sought on the basis of a contention that findings were reached by the employment of improper methods. *United States* v. *State Investment Co.*, 264 U. S. 206, 207, 211; *Washington Securities Co.* v. *United States*, 234 U. S. 76.

can courts, as exonerating petitioner from the obligation to make that full disclosure which other plaintiffs in our courts are uniformly required to make. We submit that none of the excuses offered by petitioner—excuses rested on foreign law—may be accepted as valid for the purpose at hand.[16]

a. Concededly, there is a direct conflict between American and Swiss law. On the one hand, the American law required petitioner, as plaintiff in the United States District Court, to produce the records of its *alter ego,* H. Sturzenegger & Cie. On the other hand, the Swiss authorities ordered Sturzenegger not to part with those records, with the explicitly stated purpose of preventing the production which had been ordered by the district court. J. A. 719–720, 753–755, 663. Swiss law gives a privilege to the banker to keep secret the affairs of his client (J. A. 541–542), and the law of "economic espionage" serves to keep secret, in the discretion of Swiss authorities, "economic" information (J. A. 536–540). It is fundamental in American law that privilege is an exception to the general rule that the public has a right to every man's evidence. *United States* v. *Bryan,* 339 U. S. 323, 331. And there is plainly no excep-

[16] The issue is not, as petitioner frames it (Pet. 24), whether "once eligible documents are declared to be in the possession, custody or control of a litigant and a discovery order has issued, nothing thereafter excuses a failure to produce."

tion for "economic" information or for confidences lodged by a client with his banker."

The settled principle (followed, incidentally, in Switzerland no less than elsewhere) that matters of procedure are controlled by the law of the forum (*Dixon* v. *Ramsay*, 3 Cranch 319, 324; *De La Vega* v. *Vienna*, 1 B. & Ad. 284, 288, 109 Eng. Rep. 792, 793 (K. B., 1830); Nussbaum, *American-Swiss Private International Law*, 47 Col. L. Rev. 186, 189 (1947)) requires the conclusion that the conflict here must be resolved in favor of local law. Privileges relating to evidence or to its production necessarily fall within that category. *Pritchard* v. *Norton*, 106 U. S. 124, 133–134; *Russell* v. *Barnes Foundation*, 143 F. 2d 871 (C. A. 3), certiorari denied, 323 U. S. 771; *Doll* v. *Equitable Life Assurance* Soc., 138 Fed 705, 710 (C. A. 3); *First Trust Co. of St. Paul* v. *Kansas City Life Ins. Co.*, 79 F. 2d 48, 52 (C. A. 8). Even if the foreign government were itself a party, it would be governed by the *lex fori* and required to make disclosure upon pain of default of its claim. *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134, n. 2; *Miller* v. *Kaliwerke Aschersleben*

[17] *Interstate Commerce Commission* v. *Harriman*, 157 Fed. 432 (C. C., S. D. N. Y.), affirmed in part, reversed in part, on other grounds, 211 U. S. 407; *Bowles* v. *Shawano Nat. Bank*, 151 F. 2d 749 (C. A. 7), certiorari denied, 327 U. S. 781; *McMann* v. *Securities and Exchange Commission*, 87 F. 2d 377 (C. A. 2), certiorari denied, 301 U. S. 684; 8 Wigmore, *Evidence*, Section 2286 (3d ed 1940).

Aktien-Gesellschaft, 283 Fed. 746, 753 (C. A. 2); *Republic of Liberia* v. *Roye,* 1 App. Cas. 139, 143 (H. L., 1876); *King of Spain* v. *Hullett,* 7 Bligh N. S. 359, 392 (H. L., 1833); *Rothschild* v. *Queen of Portugal,* 3 Y. & C. Ex. 594, 160 Eng. Rep. 838 (Exch., 1839); *Prioleau* v. *United States and Andrew Johnson,* L. R. 2 Eq. 659 (1866).[18]

b. As observed above, Swiss law could not in any event exonerate petitioner, as a plaintiff in the United States District Court, from the obligation to make disclosure as ordered by that court. We point out additionally that the policy considerations against according exceptional treatment to the foreign plaintiff are especially strong, where, as here, the foreign laws upon which the plaintiff (petitioner) relies appear to have been specially invoked rather than uniformly applied.

For its own purposes, petitioner has been able to draw upon the Sturzenegger records and to dis-

[18] The Swiss laws of secrecy and the order implementing them merely imposed a threat of penalty under the foreign law. The withholding of the documents by the Swiss Government did not make the documents nonexistent. They still exist; they remain on the Sturzenegger premises. J. A. 470, 522, 608. They are not unavailable "in a physical sense" as petitioner suggests (Pet. 25), though, if they were, the courts would still examine the circumstances of loss or destruction. The danger of prosecution under a foreign law is not a valid plea to an order to testify or produce documents. *King of the Two Sicilies* v. *Willcox,* 7 St. Tr. (N. S.) 1049, 1068–1070 (1850) (involving production of documents), followed in this country. *E. g., Hale* v. *Henkel,* 201 U. S. 43, 69; *United States* v. *Murdock,* 284 U. S. 141, 149; *Republic of Greece* v. *Koukouras,* 264 Mass. 318, 162 N. E. 345.

close their contents. It did so in applying for a United States Treasury license in 1940 (J. A. 748–751, 739–743); in filing an application with the American military government in Germany following World War II (J. A. 715–717, 743–746, 1603–1616); and, again, in filing its administrative claim for the vested property here in issue (J. A. 697–715, 1758–1763, 1767, 1770–1772, 1774–1776, 1784–1788, 1790, 1792–1806, 1808–1809). Perhaps the most dramatic instance of this situation occurred during the taking of Mr. Sturzenegger's deposition in Washington in 1950. Government counsel questioned Sturzenegger concerning evidence that, during World War II, he received a request from Berlin, transmitted to him by the German Consul in Basle, to transfer a large sum of money to Spain to finance German purchases of tin. Petitioner's counsel promptly telephoned Switzerland in order to secure additional information from the Sturzenegger records. The very next day, Sturzenegger disclosed a series of facts from these records "in order to rebut and overcome and explain." J. A. 873–879, 85, 93–95. The "secrets" thus disclosed included those of a German client of the Sturzenegger bank and those of a group of Swiss, Spanish, Portuguese, and German banks.

It is also noteworthy that investigators of the Swiss Compensation Office, in the course of their investigations of petitioner, made a complete examination of the files of the Sturzenegger bank.

J. A. 198–199, 205–324. These reports made disclosure of the contents of these records to the extent that Swiss authorities deemed desirable. Such disclosures were made notwithstanding the secrecy laws and without objection from petitioner or Sturzenegger. *Ibid.*

This history was not unknown to the district judge who has lived, so to speak, with this case. As Judge Laws observed (J. A. 108):

> The effect of it from our point of view is, the Swiss Government lets you [petitioner's counsel] have some of them that you can offer in evidence but conceivably there are any number of others there that might be helpful to the other side. Now, the Swiss Government stops us.

c. Petitioner suggests that, since it has belatedly tendered a large number of Sturzenegger documents (documents "cleared" by the bank's clients and by the Swiss authorities), the courts below should have held it to be in substantial compliance. To this the short answer is that both courts below have found that a full, rather than a partial and selective, examination of the Sturzenegger papers is vital to the preparation of the Government's defense. J. A. 616–617; R. 1924, 1928–1929, 1933, 1940.

While there is no occasion to re-examine that finding in this Court, we point out that the tender did not include the Sturzenegger books and that petitioner's counsel refused to give any assurance

that they would be forthcoming. *Supra,* p. 13. As the district court stated, "banking records of the transactions of a corporation are among the best possible indicia of its ownership and control" (J. A. 616).

Moreover, one can scarcely overlook the method by which the partial production was made. The first step was solicitation of waivers. But no one was under any compulsion to waive, and some have refused. In the second place, the Swiss Federal Attorney has set himself up as the judge of the scope of the discovery. He requires proof that the individual documents be "indispensable for the suit" and he has expressly retained the right to refuse clearance without stating reasons therefor.

There is no significance in mere numbers. A half-million pieces of paper produced from the bank's files might prove of immeasurably less importance than a half-dozen withheld. This is particularly true in a case in which an ultimate issue is "cloaking."[19] The crucial consideration

[19] The Trading with the Enemy Act is directed at subtle devices used to cloak enemy property, *e. g.*, devices utilizing neutral holding companies and the veils of subsidiaries. *Clark* v. *Uebersee Finanz-Korp.*, 332 U. S. 480, 483, n. 3, 484–485. See *Administration of the Wartime Financial and Property Controls of the United States Government*, Treasury Dept. (1942), pp. 29–31; *Hearings before a Subcommittee of the Senate Committee on Military Affairs Pursuant to S. Res. 107 and S. Res. 146*, 79th Cong., 1st Sess., 49, 52, 68–69, 564–585, 969–977, 1063, 1203–1221 (1945); H. Rep. No. 2398, 79th Cong., 2d Sess., 3 (1946). To reach enemy inter-

is not only that the production now tendered is partial, but that the means and methods of selection are beyond check or control either by the court or by the adverse litigant. Such a process of discovery, we submit, is no discovery at all.

Petitioner's reliance upon *Hickman* v. *Taylor*, 329 U. S. 495, is misplaced. There, this Court held (p. 510) that the "public policy underlying the orderly prosecution and defense of legal claims" does not permit a party to inquire into the work products of the adverse party's counsel. The court observed further (pp. 508–509) that there was no showing that the party seeking the discovery could not obtain access to the underlying facts from other sources. In the instant case, two courts have found that defense of the action necessitates a full and unfettered examination of the Sturzenegger records. The Government does not seek lawyers' work products; it demands access to the underlying facts. Those facts are not obtainable from other sources.[20]

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ests masquerading under innocent fronts, it is necessary to penetrate beneath the surface of apparent neutrals to uncover concealed enemy taint. If partial production were accepted, a premium would be given to those who set out to evade the Act under cover of foreign secrecy laws.

[20] Respondents' efforts, during the deposition of Hans Sturzenegger, to elicit facts contained in the records of his bank were met on many occasions by his inability to remember or by his protestation that he had no independent recollection of the facts. *E. g.*, J. A. 916, 1033–1034, 1094–1097, 1197, 1200–1201, 1281–1282, 1286–1296, 1328–1331, 1546–1548; Record 8378–8383, 8406–8409, 8823–8827, 8930–8933, 10278–10279, 11571–11581, 11666–11681.

Thus, the guiding principle of the *Hickman* case, for purposes of this controversy, is this Court's declaration that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." 329 U. S. at 507.

3. There remains for consideration the propriety of an order of dismissal. In substance, petitioner argues that this remedy may be invoked only when the failure to produce is found to result from wilful disregard or bad faith.

To begin with, we believe that dismissal is authorized by the Federal Rules of Civil Procedure. Rule 37 (b) (2) (*infra,* pp. 40–41) lists dismissal as an appropriate remedy when "a party refuses to obey an order made under * * * Rule 34" (*i. e.,* an order to produce). Aside from the fact that "failure" and "refusal" are apparently used interchangeably throughout Rule 37 (note the heading of Rule 37 (b), "Failure to Comply with Order"),[21] we do not believe that fault or bad faith is a necessary ingredient of the word "refuse."[22] Moreover, Rule 41 (b) ("Involuntary Dismissal; Effect Thereof," *infra,* pp. 41–42) authorizes dismissal for "failure of the plain-

[21] Note, also, the absence of the word "wilfully" in Rule 37 (b) and its inclusion in Rule 37 (d) ("Failure of Party to Attend or Serve Answers," *infra,* p. 41).

[22] See Webster's *New International Dictionary* (2d ed., unabridged), p. 2095.

tiff * * * to comply with these rules or *any order of court* * * *'' [Emphasis added.]

In any event, as the courts below held, the district court had the inherent power to dismiss the suit when it appeared that there was a failure to comply with the essential procedures of that court. Cf. *National Union* v. *Arnold,* 348 U. S. 37, 44. Equity has authority, independent of statute, to dismiss a cause for want of diligence in prosecution or for failure to comply with a reasonable order made in the exercise of a sound judicial discretion.[23] *Refior* v. *Lansing Drop Forge Co.,* 124 F. 2d 440 (C. A. 6), certiorari denied, 316 U. S. 671; *Barger* v. *Baltimore & Ohio R. R. Co.,* 130 F. 2d 401 (C. A. D. C.); *In re Slimmer's Estate,* 141 Minn. 131, 169 N. W. 536, certiorari denied, 250 U. S. 641; see *Dowling* v. *Isthmian S. S. Corp.,* 184 F. 2d 758 (C. A. 3), certiorari denied, 340 U. S. 935. The power to enforce discovery is one of the original and inherent powers of the chancellor. *Kelley* v. *Boettcher,* 85 Fed. 55,

[23] As section 9 (a) of the Trading with the Enemy Act (*infra*, pp. 36–37), in terms states, a suit for the return of vested property is "a suit in equity." Section 17 of the same Act (*infra*, p. 38) confers plenary jurisdiction upon the district courts "to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act." Since the suit is by consent of the United States, the conditions imposed under the Act and pursuant to valid order of the court are to be strictly met. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591. Cf. *United States* v. *Reynolds,* 345 U. S. 1, 6, 12.

66–67 (C. A. 8). Rule 41 (b), quoted above, confirms this power.

Contrary to petitioner's suggestion, there is no conflict with the decision or reasoning in *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322. There, this Court sustained a state court judgment entered pursuant to an Arkansas statute which provided for default when a party failed to honor a valid order of production. The Hammond Company, whose defense was stricken for failure of production, had resisted an order to produce on the grounds that the order was oppressive and went beyond the constitutional powers of the state *vis-a-vis* foreign corporations. This Court sustained the default judgment which ensued, on the theory that it was not in the nature of a punishment (cf. *Hovey* v. *Elliott,* 167 U. S. 409) but was a proper means of implementing a state rule which had as its object the effective administration of justice (p. 351). The Court stated further (*ibid.*) that Arkansas could "create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause."

Petitioner argues that there can be no presumption against it in the instant case because the Master did not find it guilty of bad faith or untruth. Petitioner, however, misreads the *Hammond* decision. This Court did not hold that the Hammond Company was in bad faith in ques-

tioning the validity of the order of production there issued.[24] There is not the slightest intimation in the Court's elaborate opinion that Hammond's claim that the production order went beyond the state's powers (a claim which the Court examined at considerable length) was frivolous or spurious. While the Court ultimately rejected that claim, it stated only that Hammond had made an "error of judgment" (p. 347), *i. e.*, had misapprehended the law. The Court's language as to "presumption" means simply this: a party fails to comply with an order of production at his peril; for if he fails to produce relevant information, and the excuse offered for the failure is not one which the law can accept, the law may then presume that his claim is without merit.[25]

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[24] The corresponding question in the instant case, *i. e.*, whether petitioner was guilty of misconduct in failing to produce, was the only issue of good faith referred to the Master.

[25] The following language of the opinion (pp. 351–352) is particularly pertinent:

> * * * the law of the United States as well as the laws of many of the States, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. Rev. Stat. U. S. § 724, which was drawn from § 15 of the judiciary act of 1789, after conferring upon courts of law of the United States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery, expressly empowers such courts, if a plain-

That, of course, is the situation here. The court could not accept the Swiss law as constituting a legal excuse for petitioner's non-compliance—this for the simple reason that American law must be deemed to control matters of procedure in American courts. Any other holding would mean that a foreign plaintiff might invoke the aid of the court while failing to meet its essential rules and requirements; that such a plaintiff might reap advantages denied to other plaintiffs; and, more serious, that it might receive full production from the defendant (as petitioner already has in this case) without affording the equivalent.

The decision below is not novel in the sense that it involves unfamiliar or unsettled principles. It is an unusual case, we agree, but only in the sense that the facts which call those principles into play are peculiar. So far as we are aware, there is no other case in our courts presenting a similar factual situation, *i. e.*, a failure to comply with an order of production because of an impediment created by foreign law.

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tiff fails to comply with the order to render a judgment of non-suit, and if a defendant fails to comply "the court may, on motion, give judgment against him by default." From the time of this enactment, practically coeval with the Constitution, although controversies have arisen as to its interpretation, no contention so far as we can discover, has ever been raised questioning the power given to render a judgment by default under the circumstances provided for in the statute.

We note finally that the specific problem involved has arisen in the English courts and has been decided on the basis of the principles expressed in the decision below. Certain prize cases arising during World War I involved Swedish citizens who claimed goods seized as contraband. A Swedish law, strikingly similar to the Swiss legislation here, made it unlawful to give information concerning certain types of commercial transactions. The right of the adverse party to insist on discovery was nonetheless upheld, and the claimant's failure to make disclosure resulted in denial of his claim. *Kronprinsessan Margareta,* Lloyd's List, October 31, 1917, 6 Lloyd's Prize Cases 105, n. (1917); *Steamship "Antilla" and Other Vessels,* 7 Lloyd's Prize Cases 401 (1918); see also *The Consul Corfitzon,* [1917] A. C. 550, 555–556; *The Baron Stjernblad,* [1918] A. C. 173, 178, 179; *The Kronprinsessan Victoria,* [1919] A. C. 261, 267–268.

CONCLUSION

The decision below is clearly correct and there is no conflict of decision. The courts below have acted fully within their power and discretion in implementing a valid order of production which was issued more than six years ago. The unusual forbearance of the court of appeals is attested by the provision in its judgment which accords yet an additional period of grace to petitioner. If petitioner still cannot comply with the procedures

of the court whose aid it has invoked, it must, like other litigants, suffer the consequences of such a failure. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A

Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U. S. C. App. 1, *et seq.*:

* * * * *

SEC. 9. (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or

in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

SEC. 17. The district courts of the United States are given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary".

Federal Rules of Civil Procedure:

RULE 34.—DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30 (b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the prop-

erty or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

RULE 37.—REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

(a) *Refusal to Answer.*

If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or wit-

ness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) *Failure to Comply with Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action of proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) *Expenses on Refusal to Admit.*

* * * * *

(d) *Failure of Party to Attend or Serve Answers.*

If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(e) *Failure to Respond to Letters Rogatory.* * * *

(f) *Expenses Against United States.* * * *

RULE 41.—DISMISSAL OF ACTIONS

(a) *Voluntary Dismissal: Effect Thereof.*

* * * * *

(b) *Involuntary Dismissal: Effect Thereof.*

For failure of the plaintiff to prosecute or to comply with these rules or any order

of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

APPENDIX B

Filed January 18, 1954. Harry M. Hull, Clerk.

[Record 3282]

In the United States District Court for the District of Columbia

Civil No. 4360–48

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S. A., ETC., PLAINTIFF

vs.

HERBERT BROWNELL, JR., ETC., ET AL., DEFENDANTS

Plaintiff's Designation of Record

The Clerk of this Honorable Court will please prepare a record of the following and transmit same to the United States Court of Appeals for the District of Columbia Circuit:

Document	*Filed On*

[Record 3283]

(15) Transcript of depositions of Hans Sturzenegger, Vol. I through XII	Feb. 25, 1949
(34) Deposition of Hans Sturzenegger, transcript of Vol. XIII through LVII	Oct. 26, 1950
(35) Sturzenegger deposition; exhibits 1–798 (defendant), 1 through 91 (plaintiff); stipulation of counsel	Oct. 26, 1950

[Record 3284]

(36)	Motion of plaintiff for discovery, etc	Jan. 10, 1949
(37)	Motion of Defendants under Rule 34 for production of documents; exhibits A, B, C, and affidavit of David Schwartz	Jan. 18, 1949
(38)	Two exhibits attached to memorandum in support of Defendants' motion and affidavit	Jan. 18, 1949

[Record 3288]

Respectfully submitted.

WHITEFORD, HART,
CARMODY & WILSON,

By /s/ John J. Wilson,
JOHN J. WILSON,
Attorneys for Plaintiff.

Of Counsel:
PEIDER KONZ

I hereby certify that on the 18th day of January, 1954, I mailed a copy of the foregoing Plaintiff's Designation of Record to David Schwartz, Esquire, Office of Alien Property, Attorney for Defendants.

/s/ John J. Wilson.
JOHN J. WILSON.

U. S. GOVERNMENT PRINTING OFFICE: 1955

DEC 7 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term 1955

No. 500

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., ETC.,
Petitioner,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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IN THE

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SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., ETC.,
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

This is an *unusual case.* With the statement to that effect in respondents' brief (p. 33) we agree, but while respondents are unwilling to accept petitioner's contention that the case is novel[1] in character, their brief does

---

[1] The district judge, who originated the doctrine upon which the dismissal was based, employed the word "novel" in referring to the question which he was deciding. (D.C. D.C. 111 F. Supp. 443; J.A. 619.)

agree that "the facts * * * are peculiar", which seems to amount to the same thing.

This reply brief is being written chiefly because there are numerous statements in respondents' brief, allegedly based upon the record, which are not supported by the references. We feel that this Court should be warned of the patent inaccuracies in many portions of respondents' brief. We propose to cite here only a few illustrations.

The fundamental issue in the proceedings below was whether the records of the Sturzenegger Bank were under the control of petitioner. On page 9 respondents' brief states that the District Court found "that the majority of petitioner's stock could always be controlled by the Sturzenegger bank;" citing J.A. 613-614. The actual portion of the Court's opinion on this subject as shown at J.A. 613 reads as follows:

> "Until 1940, the Swiss Compensation Office found, the majority of I. G. Chemie shares was in the possession of friendly firms and consortia of the I. G. Chemie circle or the I. G. Farben circle, and could always be controlled by Greutert & Cie.;"

It must be readily apparent that the elimination of the phrase *"until 1940"* and the placing of emphasis upon the word "always" give an entirely different meaning to the words used by the District Court. This is particularly important because the time with which the court is here concerned—regarding the element of control under Rule 34, Fed. R. Civ. P.—is nine years after 1940, and the statement in the court's opinion has only an historical significance, while respondents' brief

converts the court's words into a finding of great importance.[2]

Immediately following the above statement on page 9 of respondents' brief is a further misleading paraphrase of the court's opinion, based on the same reference, which we quote as follows: "that the partnership agreement of the bank supports the finding that petitioner controls the bank". What the Court actually said is set forth below:

> "Plaintiff has argued that I. G. Chemie was only a sleeping partner or investor in H. Sturzenegger & Cie., that it was only entitled to be informed of the course of the partnership affairs. Under the partnership agreement, only the special delegates, one from each partner, were personally entitled to inspect the business books and papers of the partnership, and they were required to treat their knowledge as strictly confidential. However, this provision obviously was intended to keep the records from prying eyes outside the circle in the ordinary course of business and, perhaps, to preserve bank secrecy. It could not have been intended to apply where the very fortunes of the partners were at stake. Personal inspection was still open to Sturzenegger himself and to the representatives of the other partners." (J.A. 613)

There is not the slightest basis for construing the statement of the court as having the meaning set forth in respondents' brief. The excerpt from the court's

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[2] The importance of dates is also demonstrated in connection with footnote 14 on page 21 of respondents' brief in opposition, where it is stated: "Petitioner owned 44% of the Sturzenegger firm." Respondents, themselves, qualify this statement at the top of page 9 of their brief by the phrase "until 1943". It must be remembered that the question of control in this proceeding had to be decided as of 1949-1950.

opinion would seem to mean that the court, despite the express language to the contrary, believes that petitioner would have access to the bank's records in important matters. This conclusion is solely a creation of the district judge, but in any event, there is no justification whatever for respondents' assertion that the partnership agreement supports the finding of control.

In footnote No. 13 on page 19, respondents' brief quotes a statement taken from Record 1514 allegedly to the effect that the court said it had made *a lot of findings* on control. What the court actually said in complete context is shown in Appendix A hereto, where it appears that the court was talking about the physical connection between the two companies and not *control* as understood in a legal sense. Upon examination of this excerpt it will be seen that petitioner's counsel pointed out that there was no evidence before the Court upon which he could make findings of control in a legal sense.

Thus, petitioner's statement on page 9 of its petition, that the district judge refused to make findings of fact is fully supported by petitioner's reference to J.A. 677-678.

The great difficulty of this case arises out of the fact that there was no hearing or trial at which witnesses were sworn and exhibits offered and received in evidence. Almost any kind of a document could be dropped into the file but none was received in evidence as such. As a result of this loose procedure, everything was in the record and nothing was in the record. This confusing situation is probably the underlying cause of respondents taking in one breath the position that: "Due process does not require that a hearing on the preliminary issue * * * be conducted as if it were a trial" (p.

17), and immediately thereafter to assert that the explanations of Government counsel should be taken as facts because "petitioner, of course, had it fully within its power to offer the documents" (p. 19), although they had not been identified or proved by competent witnesses. What this argument amounts to is the statement that petitioner had the alternative of accepting the assertions of counsel as being true or stipulating as to the accuracy of documents concerning which it had no knowledge. This is indeed strange doctrine but stranger still is the statement that follows that there was no necessity for introducing the documents "in light of the concessions of petitioner's counsel" (p. 19). Presumably, the basis for this claim of concession by petitioner's counsel would be the references to the Joint Appendix immediately above, namely: "J.A. 553-554, 86-87, 683-684, 98-99, 102-106". Examination of the Joint Appendix shows that the above references relate, respectively, to an argument memorandum of defendants' counsel, argument of defendants' counsel and argument memorandum of plaintiff's counsel, argument of plaintiff's counsel and further argument by both defendants' and plaintiff's counsel. None of these references furnishes any support for the claim of alleged "concession of petitioner's counsel."

In other places in the record respondents rely upon alleged concessions of counsel where, in fact, there have not been any. At the end of footnote No. 14 on page 21, respondents claim to rely on admissions of counsel with respect to "a tight chain of control linking petitioner and the Sturzenegger bank", referring to J.A. 90, 96; R. 1152-1155. The first reference is a portion of the argument of petitioner's counsel on November 24, 1952. The reference to the Record relates to an additional portion of the same argument. Upon examination of

these references we are certain that the Court will find nothing indicating an admission by counsel to the effect that is claimed.

It is significant with respect to the numerous irregularities in procedure that respondents do not defend the procedure as such, but rely upon petitioner's alleged failure to object (Br., p. 16). The burden of proving facts rests upon the party who asserts them—in this instance upon the respondents—but there is no rule of law that a broad assertion, once made, must be accepted as true by the other side unless he specifically objects. Quite the contrary is true, namely, that mere assertions prove nothing unless they are stipulated or conceded to be true in fact. It is admitted by respondents (Br., p. 17) that the reports of the Swiss Compensation Office[3] were not stipulated in evidence, although petitioner's counsel at one time expressed the willingness to do so, but yet, although not stipulated, every word therein has been accepted as gospel if it supported respondents' contention, but other parts, including the conclusion of the Swiss Compensation Office that petitioner was Swiss[4] and not German, have been rejected.

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[3] On page 17 of their brief in opposition, respondents refer to these reports as "received as exhibits" and that petitioner "did not object to the receipt of these exhibits." The term implies an offer in evidence of these documents. This did not occur. What did occur was that one of respondents' lawyers, with absolutely no first-hand knowledge of the contents of these reports, attached them to his affidavit in which he merely identified them. (J.A. 198). There was no occasion to deal with the admissibility *vel non* of such reports.

[4] "The S.C.O., after objective examination of all documents and evidence, is convinced that the liquidation of the contact with I.G. Farben circles, which took place in June 1940, was carried through seriously, conclusively, and without reservations." (J.A. 230).

By the method which was pursued, a myriad of facts went into the record without the authors of the reports being subjected to a single question in cross-examination.

Again, on the following page of respondents' brief (p. 20) it is asserted that the unverified exhibits to the Sturzenegger deposition should be taken as true because petitioner failed to move "to exclude the Sturzenegger exhibits from the transcript of record". Further, on the same page, it is apparently contended that petitioner has waived its right in this respect because it designated those documents to be included in the record sent to the Court of Appeals. This is the strangest doctrine of all. As stated in the petition, many portions of the Sturzenegger deposition could properly be referred to by respondents. Therefore, it was only fair that petitioner should designate that deposition, and, of course, all exhibits thereto had to go along. The complaint in the petition is that many *unidentified* exhibits were not even shown to the district judge but were printed in the Joint Appendix at the insistence and expense of respondents and thus apparently relied upon by them. (See pet. pp. 11 and 18).

The controversy that sometimes arises from the designation of immaterial data is that the appellate court will charge the responsibility for costs to that party who has insisted upon such immaterial data. In this instance, by agreement, respondents paid for the printing of the exhibits now under criticism. To imply, as seems to be naively contended in respondents' brief, that to designate a portion of the record is to admit its sufficiency and competency as evidence, would be introducing a revolutionary theory that would be destruc-

tive of all accepted appellate practice and procedure. (See Rule 75, Fed. R. Civ. P.)

It has been pointed out in the petition that the district court in its order of dismissal relied upon Rule 37(b)(2) and Rule 41(b), Fed. R. Civ. P., while the Court of Appeals relied only upon Rule 41(b). Respondents' brief seems to rely upon both rules and also upon the inherent power of the court, citing *National Union* v. *Arnold,* 348 U.S. 37, 44. (Br., p. 30) In that case there was a trial and judgment on the merits and the appeal was dismissed because of the failure of the defendant to comply with an order to surrender bonds to protect the collectibility of the judgment. This Court sustained that ruling, distinguishing the case from *Hovey* v. *Elliott,* 167 U.S. 409, upon the ground that there was a trial and judgment on the merits and that due process does not require a right of appeal. That case has no application to this situation because petitioner has not had a trial on the merits.

Petitioner believes that the other legal considerations discussed in respondents' brief beginning with paragraph numbered 2 on page 21 have been completely disposed of in our petition.[5]

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[5] The Court will keep in mind that all incidents described on page 25 of respondents' brief in opposition occurred prior to the seizure of the banks' papers by the Swiss authorities in June, 1951. In addition, the quotation from Judge Laws on page 26 is taken out of context, and was preceded by a colloquy between the district judge and petitioner's counsel in which the court acquiesced in the following observation of petitioner's counsel (J.A. 107):

> "MR. WILSON: * * * I am sure Mr. Schwartz [respondents' counsel] does not mean to say that he has evidence that I have material papers from the Sturzenegger files that he does not have."

This reply brief should not be concluded without the observation that the brief in opposition is designed to leave the impression that respondents fully performed the discovery requirements imposed upon them (Br., pp. 5-6), and that petitioner was evasive even in the production of its own documents (Fn. 3, p. 8, Br.).

With respect to the former, respondents withheld several thousand documents from inspection by petitioner upon the ground of privilege, and at the time of the dismissal order, there was pending a motion by petitioner to require respondents to give a written description of such documents. (J.A. 597).

The charge that petitioner was evasive in the production of its own documents was also unfairly made to the Court of Appeals. In our reply brief there, we said (p. 10):

> "Moreover, appellees' narrative falls far short of giving the Court a fair picture of the controversy relating to both the papers and the books[14]".

The footnote (14) appended to the foregoing statement reads as follows:

> "[14] *Re papers:* In a vast exhibition of over 41,000 documents, perfection cannot be expected. After the Custodian filed his 'second' discovery motion regarding the 9,800 documents, appellant discovered that about 5,000 of them were second and third carbons of identical papers theretofore exhibited to the Custodian, and these were promptly produced. (R. 3055). The Special Master did not uphold all of the Custodian's contentions. (R. 2834) [J.A. 550]. Further search produced many more of the items listed by the Custodian as missing. (R. 3055-3076). Those which were not thereafter produced were either not found, or their production was being contested on the ground of privilege

(R. 3506-24) [J.A. 685] or for other reasons. (R. 3153) [J.A. 628]. It is unfair for appellees to call these 'suppressed' papers.

"*Re books:* The discovery order required appellant to exhibit the 30 books of itself and of its wholly owned subsidiary, Osmon A. G., which had been inspected by the Swiss Compensation Office. (R. 2024, 1761) [J.A. 340, 234]. Mr. Walter Germann's affidavit (R. 3155) [J.A. 630] proved that such books were given to the Custodian. In connection with their claim regarding a 'duplicate set', appellees did not and could not maintain that the produced books failed in any respect to reflect faithfully and accurately the transactions evidenced by vouchers and other documents taken by appellees from appellant. (R. 3077-3106) [J.A. 572-596]."[6]

Petitioner submits that the impressions sought to be left by respondents in the foregoing respects are unfair and inaccurate.

Finally, respondents rely upon the two-court rule (p. 21) to sustain the judgment below. That rule is to the effect that this Court will not ordinarily reverse a finding of fact approved by two courts, where there is any substantial evidence to sustain it. That rule has application only where there has been an actual trial of an issue of fact. In this case there has been no trial, no swearing of witnesses, no taking of testimony and no cross-examination. The order of the Court was based upon a summary determination of the issue of control. In such circumstances, the appropriate standard should

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[6] Respondents' motion (J.A. 572) regarding the books was pending and undisposed of when the district judge dismissed petitioner's complaint. Therefore the phrase in footnote 3, page 8, respondents' brief, that "The Government had also shown * * * ", should have been written "The Government had also asserted * * * ".

be, by comparison, that which is provided by Rule 56 of the Federal Rules of Civil Procedure, authorizing summary judgments only when there is "no genuine issue as to any material fact" (see App. B). In this case there is a very definite and genuine issue as to the material question of control and the Federal Rules of Civil Procedure provide no means of disposing of such an issue, except in the ordinary manner of trial and the taking of testimony and cross-examination. The two-court rule cited by respondents relates to the weighing of evidence in the record, and not to summary determinations and judgments. If there is a genuine issue as to any material fact, then petitioner is entitled, as a matter of right, to a trial of that issue in the normal way.

Therefore, the threshold question presented by this petition is whether this Court is willing to place its stamp of approval upon the summary determination of the issue of control, without a trial or hearing in the ordinary sense, particularly under the circumstances of this case where that determination has led to a judgment of dismissal with prejudice.

Respectfully submitted,

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Attorneys for Petitioner

December 7, 1955

APPENDIX A

Record, Pages 1514 and 1515

MR. WILSON: Let me give you three points I am going to argue in the Court of Appeals. I am going to say the court was in error on three different prongs of the control proposition.

I am going to say the court was in error on the question of control without regard to the seizure of the property by the Swiss Federal Attorney.

THE COURT: I remember that. I think I made a lot of findings on that, as I remember it, in the first opinion, that they handed papers across the table to one another, and had offices in the same place, and I made a lot of findings, as I remember.

MR. WILSON: I don't want to be subtle about this, and I don't want to re-argue this, but if you sat down to make findings based upon the evidence, you wouldn't find the evidence to support those findings. That is exactly what I am getting at, and that is what I am going to argue to the Court of Appeals, whether or not you make findings, and to round out my three pronged situation I am also going to argue, secondly, the loss of control by the seizure by the Swiss authorities.

Thirdly, I am going to argue what I argued to Your Honor that the fact that waivers had to be gotten from third parties is the exercise by a control of a third party who is not a party to this action and that we would have to sue for libel (*sic.*)* to get the documents, and the cases show we don't have to do that.

So I am going to go in all three directions in attacking Your Honor's decision, and on that argument, again going back to what you said was a prima facie finding of control,

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* Mr. Wilson actually said: "sue and labor".

and which you crystalized by a decision last February in saying you now found conclusively that Interhandel had control of the Sturzenegger papers.

I say the facts do not support this, and what you have written on the subject does not constitute findings of fact, and if I were able to to require you to make findings, you would find that the so-called evidence just doesn't exist in this record, or elsewhere, for that matter, so that I am through with this point. I have made it. I have set forth six grounds where I think there has been a failure to make findings and my record is now satisfactory to me in this field.

APPENDIX B

Rule 56(c) Federal Rules of Civil Procedure

SUMMARY JUDGMENT

* * * * *

c. MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Amended, effective March 19, 1948; see 10 Fed. Rules Serv. cxvi.)

FILED
JAN 31 1956
HAROLD S. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1955

No. 500

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc., *Petitioner*,

v.

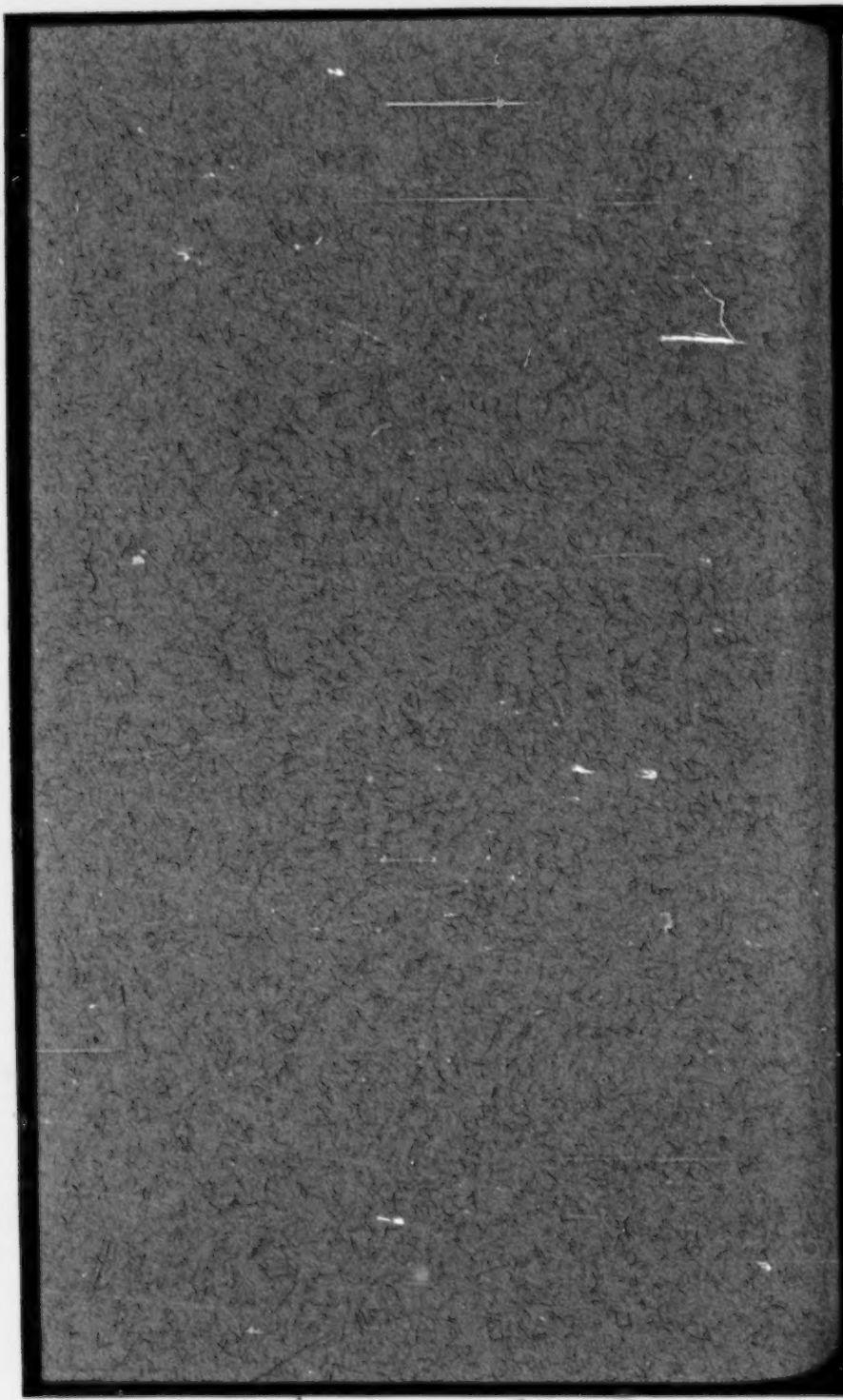
HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

ROGER J. WHITEFORD
JOHN J. WILSON
PHILIP S. PEYSER
Attorneys for Petitioner

Press of Byron S. Adams, Washington, D. C.



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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI

Comes now the petitioner and petitions this Honorable Court for a rehearing of the order of January 9, 1956, denying its petition for a writ of certiorari to review a judgment and decision of the United States Court of Appeals for the District of Columbia Circuit.

Petitioner moves that action on this petition for rehearing be deferred until a reasonable time after the expiration of six months after the date of the filing of the mandate of the Court of Appeals in the District Court.

This action, instituted by petitioner Swiss corporation under the Trading with the Enemy Act for the recovery of practically all of the stock of a large American corporation, was dismissed by the District Court for failure to comply with a discovery order for the production, in Switzerland, of all of the records of a private Swiss bank alleged to be under the control of petitioner. Although 63,000 documents were produced after obtaining waivers and consents under the Swiss secrecy laws, the District Court dismissed the action with prejudice, because of failure to produce *all* of such documents. In affirming the decision of the District Court, the United States Court of Appeals for the District of Columbia Circuit modified the order of dismissal to the extent of allowing petitioner six additional months in which to produce the documents, the concluding paragraph of its opinion being as follows:

> "One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered. This will afford another opportunity to bring the case on for a trial and decision on the merits."*

Thus, the order of dismissal was conditional and may never become finally effective. The case may not now

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* The judgment of the Court of Appeals provides as follows:
"On consideration whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed, provided, however, that if within six months after the receipt by the District Court of the mandate of this Court in this case discovery shall be made as required by the District Court, then the order dismissing the complaint shall be vacated by the District Court."

be ready for consideration, and, indeed, may never require consideration by this Court. Upon the assumption that the modification by the Court of Appeals may have been the reason for the denial of the petition for certiorari, this petition for rehearing is being filed.

If petitioner is able to perform the discovery within the allotted time, dismissal will not occur. Under such circumstances, it would be unnecessary to review the decisions of the lower courts in this case. It was in this posture that the petition for certiorari came before the Court in this case. The mandate of the Court of Appeals was filed in the District Court on January 19, 1956, and the six-months' period has begun to run. Petitioner is making every effort to comply with the discovery order, and it is possible that it may succeed. If it does, the threat of dismissal will disappear. If it does not succeed, dismissal will be *final* in every sense of the word, and the posture of the case, as described above, will be changed. No alternative to final dismissal will then exist. This court may then have a different view of the matter.

Petitioner is asking this Court to retain jurisdiction in the meantime over the application for certiorari. It is believed that this is the only method by which this may be accomplished under the circumstances. *Compare, Barsky* v. *United States*, 334 U.S. 843 (October Term 1947—petition for certiorari denied June 14, 1948), and same case, 339 U.S. 971 (October Term 1949—petition for rehearing denied May 29, 1950.)

Respectfully submitted,

ROGER J. WHITEFORD
JOHN J. WILSON
PHILIP S. PEYSER
Attorneys for Petitioner

Certificate of Counsel

The undersigned counsel for petitioner hereby certify that this petition is presented in good faith, and that it is not presented for delay in the ordinary sense since no delay is contemplated in respect of the mandate upon the judgment of the Court of Appeals. Counsel also certify that this petition is restricted to the grounds specified in rule 58(2) of this Court.

ROGER J. WHITEFORD

JOHN J. WILSON

PHILIP S. PEYSER
Attorneys for Petitioner

January 31, 1956.